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THE UNITED STATES SUPREME COURT: 1947-48*

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COMPREHENSIVE study of a court requires analysis of the economic, social, and political world of which it is a part. So much cannot be attempted here, and yet the Supreme Court, 1947–48, must be seen as part of an America in oscillation. A democracy is not always sure of its bearings, and in the past year the country has traveled in a great many directions at once. So has the Court.

In last year's review of the October 1946 term, the writer said that the Court, as an institution of government, was "follow[ing] a new and distinctly conservative trend." But examination of the 1947 term cannot justify any definite conclusion as to the correctness of this post-1946 statement. There were certainly remnants of the glory of the late New Deal trailing a few of the 1947 term decisions, and the Court's left wing of Black, Douglas, Murphy, and Rutledge prevailed in a far higher proportion of the important cases than in 1946; but the volume of clear-cut holdings on significant issues at the 1947 term was too small to make the year more than an eddy in the social and economic history of the Supreme Court. Like America, the Supreme Court did not go anywhere very definitely in 1947–48.

But if lawyers and Justices were seldom at the barricades of social reform in 1947, they were often in the library. There were technical disputes

* This article purports to be as much a social survey as a legal analysis of the work of the Supreme Court at the last term. It is the second of a contemplated annual series and is written in part for the legal, social, and economic historians of the future who may find it useful to have a contemporary view of the last term's work. The preceding article, The United States Supreme Court: 1946–47, 15 Univ. Chi. L. Rev. 1 (1947), will hereafter be cited as 1946 Term Article.

† Assistant Professor of Law, Indiana University Law School. A troublesome feature in reporting about 10% of this year's cases is that the writer has been engaged in litigation either in the case itself, in a companion case, or in a case involving very similar questions. These contacts concededly cloud objectivity, though the writer's roles were minor.

of considerable significance, particularly in matters of jurisdiction and procedure; and there was a thorough reconsideration of some important matters of trade regulation and the anti-trust laws.

I. HIGH SPOTS OF THE YEAR

Nine cases of high importance marked the 1947 term. Of these the most significant was the group of restrictive covenant cases.[1] Though, as will be shown below, the short-range consequences of the restrictive covenant cases may be slight, the potentialities of the doctrine there declared are tremendous; and even if they are never realized, the decisions remove a major deformity in the structure of Constitutional Law.

Three very important anti-trust cases, and a whole series of others in addition, gave new prospect of militant enforcement of the anti-trust laws.[2] With the anti-trust cases may be linked the *Cement* case,[3] which struck hard at the basing-point system for non-competitive pricing. Since Congress was proceeding Janus-like toward both the enforcement and the relaxation of the anti-trust laws,[4] and since a change of administration may well be in the offing, it is impossible to guess whether the potentialities of these decisions will ever be realized. The upholding of the Renegotiation Act was also a decision of great economic importance.[5]

Most of the civil rights cases followed predictable lines. *Illinois ex rel. McCollum v. Board of Education*[6] invalidated an Illinois system of school-released time for religious education. The decision will require a review of all such released-time arrangements and doubtless invalidates most of them. Another significant civil rights case was *Oyama v. California*,[7] which indirectly but effectively terminated an unusually flagrant system of discrimination against American citizens of Japanese ancestry. In another important case the government's power of search and seizure, given broad scope in the preceding term, was once again restrained.[8] Still another decision freed labor unions for renewed political activity through publication.[9]

[1] Shelley v. Kraemer, 334 U.S. 1 (1948); Hurd v. Hodge, 334 U.S. 24 (1948).

[2] United States v. United States Gypsum Co., 333 U.S. 364 (1948); United States v. Columbia Steel Co., 68 S. Ct. 1107 (1948); United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948).

[3] FTC v. Cement Institute, 333 U.S. 683 (1948).

[4] At the same time that Congress was giving the Anti-trust Division one of its largest appropriations, it passed the Bulwinkle Bill over President Truman's veto, thus partially exempting railroads from the anti-trust laws, S. 210, 80th Cong. 2d Sess. (Pub. L. No. 662, June 17, 1948).

[5] Lichter v. United States, 68 S. Ct. 1294 (1948).

[6] 333 U.S. 203 (1948).

[7] 332 U.S. 633 (1948).

[8] Trupiano v. United States, 68 S. Ct. 1229 (1948).

[9] United States v. CIO, 68 S. Ct. 1349 (1948).

If there were hard feelings among Justices in the year past, the opinions happily do not reveal them. The work of each individual Justice, the operation of the Court as an institution, and the most important of the decisions are discussed in the following sections.

II. THE REGULATION OF LABOR AND BUSINESS

Two areas of law which had provided the major excitement in the preceding year showed slight development during 1947–48. The labor cases were of little general significance,[10] and the power of the states to tax activities affecting commerce remained as clouded as it was at the close of the 1946 term.[11] But the real economic tension of the 1947 term arose in the field of restraints of trade.

MONOPOLY AND FREE ENTERPRISE

Congress . . . did not condone "good trusts" and condemn "bad" ones; it forbade all. Moreover, in so doing it was not necessarily actuated by economic motives alone. It is possible, because of its indirect social or moral effect, to prefer a system of small

[10] Bakery Sales Drivers Local v. Wagshal, 333 U.S. 437 (1948), held that a quarrel over the debts of a delicatessen in which the union appeared as collection agent was not a "labor dispute" within the meaning of the Norris-La Guardia Act. Kennedy v. Silas Mason Co., 334 U.S. 249 (1948), held that as matter of discretion the Court would not permit the Fair Labor Standards Act coverage of workers producing munitions for sale to the government to be settled on a summary judgment proceeding. This case, like the Paramount decision, 334 U.S. 131 (1948), indicates the manner in which government legal policy shifts with administrations. The government took opposite stands on the competitive bidding issue in the trial court and Supreme Court in Paramount. The Department of the Army was permitted to oppose the claim in the Silas Mason case despite the fact that the Attorney General had conceded its validity during the war. Government's brief, at 26–27 n. 11. The most important labor case was Bay Bridge Operating Co. v. Aaron, 68 S. Ct. 1186 (1948), holding five to three that employees in the longshore industry were entitled by the Fair Labor Standards Act to time and one-half for overtime hours in addition to the time and one-half the day rate they were already given by their contract for evening work. The employees thus get time and one-half on time and one-half, and the decision gives the longshoremen a multimillion dollar windfall, an amount so large that not even their own tough union thought they should have it. The Court held that the time and one-half night rate was not "overtime," but was merely "night differential" and hence was the "regular rate" for night hours. The fact that the 50% bonus is two or three times larger than any "night differential" in American industry and was substantially the amount required by the statute for "overtime" did not trouble the majority.

[11] The cases on the extent to which the Commerce Clause precludes state legislation were principally tax cases this year. Aero Mayflower Transit Co. v. Board of Railroad Com'rs, 332 U.S. 495 (1948), a state transportation tax case, restated the rule of the leading case, Interstate Transit Inc. v. Lindsey, 283 U.S. 183 (1931), by making the test of validity of carrier taxes whether the tax is "for the purpose of" charging for the use of highways rather than "for the privilege of doing the interstate business." Since taxes are laid for the purpose of raising money and not for the sake of either verbalism, the test may prove hard to apply. Others were Central Greyhound Lines, Inc. v. Mealey, 68 S. Ct. 1260 (1948); Memphis Natural Gas Co. v. Stone, 68 S. Ct. 1475 (1948); Toomer v. Witsell, 68 S. Ct. 1156 (1948). Another "negative implication" case, dealing with non-tax matters, was Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28 (1948), involving discrimination against Negroes in international transportation.

producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the directions of a few."[12]

A great issue of our time is whether it is possible, by law, to make effective a preference for "a system of small producers." By 1948 the tide has become so heavy against that system that the battle for it may already be irrevocably lost. For against brave dicta are facts:

ACQUISITIONS IN MANUFACTURING AND MINING, 1940–46[13]

Size of Acquiring Concerns (Assets: Millions of Dollars)	Number of Acquiring Concerns	Number of Concerns Acquired
50 and over	140	524
10–49	229	470
5–9	130	213
1–4	198	276
Under 1	123	175

The two great problems of enforcement of the trade laws are the determination of their substantive content and the application of remedies for their violation. Since judicial regard for substance has outrun judicial regard for remedy, the result is often a pronouncement of tremendous offense and minute penalty.[14] In 1947 the Court slightly extended both substance and enforcement.

a) Substantive Principles

The most important substantive developments under the Sherman Act and related statutes were the reconsideration of the right of patent and copyright holders to fix the prices at which their licensees could sell products,[15] the determination that many practices of the movie industry were

[12] United States v. Aluminum Co. of America, 148 F. 2d 416, 427 (C.C.A. 2d, 1945).

[13] Letter from Acting Chairman, FTC, S. Doc. 17, 80th Cong. 1st Sess. (1947), at 8. See also on the extremely rapid trend of monopolization in the United States: Staff Report of the Monopoly Subcommittee of the House of Representatives Committee on Small Business (Dec. 27, 1946); "Economic Concentration and World War II," Report of Smaller War Plants Corp. to Special Committee on Small Business, Senate Committee print, 79th Cong. 2d Sess., No. 6; "Maintaining Free Competitive Enterprise," Report of Chairman of Senate Small Business Committee, 79th Cong. 1st Sess., Committee print No. 3. An indication of how far we have moved from ancient moorings is columnist David Lawrence's denunciation of Rostow, A National Policy for the Oil Industry, as "socialistic." Washington Evening Star (Jan. 27, 1948). The book advocates enforcement of the anti-trust laws in the oil industry, but competition is apparently an equivalent of public ownership to such thinkers as Lawrence.

[14] See also 1946 Term Article, at 14–16.

[15] United States v. United States Gypsum Co., 333 U.S. 364 (1948); United States v. Line Material Co., 333 U.S. 287 (1948); United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948); Schine Chain Theaters v. United States, 334 U.S. 110 (1948); United States v. Griffith, 334 U.S. 100 (1948).

illegal,[16] the extension of the Sherman Act to "local" practices,[17] and the approval of the further expansion of United States Steel.[18]

In 1926 *United States v. General Electric Co.*[19] held that a patent holder licensing others to produce could condition his license on the licensee's agreement to charge fixed prices for the product. This year the Court withdrew a part of this broad-scale invitation to use patents as a front for industry-wide price fixing.

Justices Black, Douglas, Murphy, and Rutledge wished to overrule the *General Electric* decision for reasons expressed by Justice Douglas in a brief statement of extraordinary lucidity.[20] No fifth member was willing to go quite so far, but two important qualifications of the rule were made in the *Gypsum*[21] and *Line Material*[22] cases.

The gypsum industry saw that the *General Electric* device enabled United States Gypsum "to take a dominating position in the industry with an opportunity to control or at least to participate in the control of prices through legitimate means of patent licenses." At a series of conferences the entire industry, which manufactures products used in substantially all building construction, devised a license system which stifled all price competition.

All the Justices participating agreed with Justice Reed that the *General Electric* case "gives no support for a patentee, acting in concert with all members of an industry, to issue substantially identical licenses to all members of the industry under the terms of which the industry is completely regimented, the production of competitive unpatented products suppressed, a class of distributors squeezed out, and prices on unpatented products stabilized."[23]

But not all these circumstances are necessary to create an exception to *General Electric*. In the *Paramount* decision later in the term the Court compressed the *Gypsum* modification of the price-fixing right to this: Patentees and copyright holders may "not regiment an entire industry by licenses containing price-fixing agreements."[24]

[16] Motion pictures cases cited note 15 supra.

[17] Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219 (1948).

[18] United States v. Columbia Steel Co., 68 S. Ct. 1107 (1948).

[19] 272 U.S. 476 (1926).

[20] Concurring opinion in United States v. Line Material Co., 333 U.S. 287, 315 (1948).

[21] United States v. United States Gypsum Co., 333 U.S. 364 (1948).

[22] United States v. Line Material Co., 333 U.S. 287 (1948).

[23] United States v. United States Gypsum Co., 333 U.S. 364, 400 (1948).

[24] United States v. Paramount Pictures, Inc., 334 U.S. 131, 143 (1948).

How much less than the entire industry may validly be "regimented" is not yet known. But in the *Line Material* decision it was held that the patent holder who would "regiment" some permitted fragment of an industry must do so on his own. He cannot collaborate with another patent holder and devise a cross-licensing system for any price-fixing purpose.

Price fixing was a small part of the misdeeds of the movie industry, and the Court in the *Paramount*[25] and companion cases considered the other violations of the anti-trust laws as well. While the trial was long and the facts are many, the gist of the problem may be stated briefly: The five "majors" of the motion picture industry both produce and exhibit. In the ninety-two cities of over 100,000 population, 70% of the first-run theaters are affiliated with a major. In the cities of 25,000 to 100,000 the majors have interests in 60% of the first-run theaters. In about 300 smaller towns they have interests in all theaters. They also own many theaters other than those showing first runs.

The dominance of these and other large exhibitors is ruthlessly achieved, and the profits flowing from the system are protected by elaborate controls. For example, second-, third-, and later-run theaters are classified; each is allowed to exhibit only after a "clearance" period has elapsed since the prior showing. Theaters of different exhibitors were pooled and their profits divided, thus ending competition. Special opportunities offered to comparatively large independents were denied their smaller competitors. The majors established the system of block booking, requiring exhibitors to take a group of pictures or none at all. The pattern of trade practices has been one of the most vicious in American commerce. Most of these practices were outlawed by the district court and the Supreme Court: Only "reasonable" clearances will be allowed, and the other practices listed must stop.

A third anti-trust decision, *Mandeville Island Farms v. American Crystal Sugar Co.*,[26] restored a sensible symmetry to the Commerce Clause. In 1937 a chastened Supreme Court, compelled to reconsider some constitutional doctrine, retained an understandable desire to save as much face as possible. The result was the renewed device of "affecting commerce," as distinguished from "in commerce," as a method for defining constitutional power.[27] In substance, the Court held that Congress had two virtually distinct powers, one to regulate commerce and the other to regulate

[25] United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948).

[26] 334 U.S. 219 (1948).

[27] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); see generally Stern, The Commerce Clause and the National Economy, 1933–1946, 59 Harv. L. Rev. 645, 883 (1946).

that which affects commerce; and the enormous expansion of federal power after 1937 was pinned to the latter theory.

This expanded doctrine was rarely applied to the Sherman Act, since the Act had been phrased in terms of "commerce" rather than "affecting commerce" long before the distinction acquired significance. It was therefore argued that the Sherman Act did not have the same scope as other exercises of the Commerce power. Thus, as recently as four years ago, the Court held that the insurance industry was covered by the Wagner Act ("affecting commerce"),[28] but a minority contended in the *Southeastern Underwriters* case[29] that the industry was not covered by the Sherman Act.

Changes in the personnel of the Court since 1937 made possible the obliteration of the distinction. In the *Mandeville Farms* case the issue was whether the Sherman Act covered restraints of trade between California sugar-beet growers and California refiners. Justice Rutledge's majority opinion merged the two lines of theory by relying on the broadest of both the "in commerce" and the "affecting commerce" cases.[30]

Another case involving monopoly in industry was characterized by dissenting Justices Black, Douglas, Murphy, and Rutledge, speaking through Justice Douglas, as "the most important anti-trust case which has been before the Court in years."[31] The action in the *Columbia Steel* case was brought by the government to enjoin the United States Steel Corporation and its subsidiaries from buying the Consolidated Steel Corporation, the largest steel fabricator on the West Coast. The majority opinion by Justice Reed held that the sale could not be restrained.

The Consolidated story begins with the Geneva purchase. During the recent war, the government had spent nearly $200,000,000 developing the Geneva, Utah, steel plant. In 1946 United States Steel, its war-time operator, bought the Geneva plant from the Surplus Property Administrator on a bid of $47,500,000. At that time the Attorney General filed an opinion, as required under the Surplus Property Act, that the Geneva sale did not violate the anti-trust laws. United States Steel then sought to buy Consolidated to use part of its Geneva product.

[28] Polish Nat'l Alliance v. NLRB, 322 U.S. 643 (1944).

[29] United States v. Southeastern Underwriters Ass'n, 332 U.S. 533, 573–74 (1944).

[30] The Southeastern case, for "in commerce"; Wickard v. Filburn, 317 U.S. 111 (1942), for "affecting commerce." Presumably the distinction now loses all utility except for interpretation of post-1937 legislation, such as the Fair Labor Standards Act, which was passed in reliance on a difference between the terms. See, for example, McLeod v. Threlkeld, 319 U.S. 491, 493 (1943), and cases cited therein.

[31] United States v. Columbia Steel Co., 68 S. Ct. 1107, 1127 (1948).

The essence of the government's objection to the Consolidated purchase was that it would suppress competition for Consolidated's rolled steel requirements, since United States Steel would thereafter control this market; that it would eliminate competition between Consolidated and United States Steel in the sale of fabricated steel products and would further the vertical integration of the entire steel industry from production to fabrication under United States Steel; and that even if monopoly had not in fact resulted, the purchase was made with an intent to monopolize. The Court responded in substance that the elimination of Consolidated's business of several million dollars per year was too small to be of consequence; that the extension of integration was not per se improper; and that the intent was the perfectly proper one of utilizing the Geneva product.

But the Supreme Court was hardly required to approve the Consolidated sale merely because of the Attorney General's prior error in approving the Geneva sale. The real division in the Court is a straight matter of philosophy. United States Steel controls one-third of American rolled steel production. Its manufacturing capacity in 1940, as the dissent points out, was greater than that of all German producers combined and more than twice that of all British or French producers.[32] Such an enterprise, unless it is to merge with the few other giants in the field, will necessarily expand by "trifles," for there are no other worlds to conquer. If it may absorb comparatively small plants simply because they are—relatively—small, then United States Steel can absorb much that remains of the area of production so long as it proceeds by inches.

The philosophic clash arises because the minority, with abundant quotation of Brandeis' *The Curse of Bigness*, contends that sheer size is an evil which the Sherman Act was meant to prevent. To allow a concern to grow as large as United States Steel is in effect to transfer the government of the country from its elected representatives to an industrial oligarchy. To the dissenters, the matter is as simple as this:

> . . . United States Steel has one-third of the rolled steel production of the entire country. The least I can say is that a company that has that tremendous leverage on our economy is big enough.[33]

What the dissent finds so clearly written into the Sherman Act is nonexistent for the majority. To Justice Reed this is merely "an expansion of facilities of an existing company to meet the needs of new markets of a community, whether that community is nationwide or county-wide. . . . If businesses are to be forbidden from entering into different stages of production that order must come from Congress, not the courts."[34]

[32] Ibid., at 1130 n. 6. [33] Ibid., at 1130. [34] Ibid., at 1123, 1124.

The rule emerging from the cases of this decade may be put thus: Sheer size may violate the anti-trust laws when one concern swallows an entire industry, as in the case of the Aluminum Company. Yet size is quite innocuous when one concern merely swallows one-third of a far more important American industry such as steel. While we may not tolerate the rule of One, we find no objections to a rule of Three or Four.

The Federal Trade Commission prevailed in two cases establishing important principles. In the *Cement Institute* case[35] the basing point system was found illegal, and in the *Morton Salt* case[36] quantity discounts were sharply confined.

In the *Cement* case Justice Black's majority opinion utilized the legendary "Pittsburgh plus" basing point system as a handy starting point for comprehending the more complicated system in the cement industry. Pittsburgh plus meant that all steel was billed as though it had been shipped from Pittsburgh even though it had been shipped from a point much closer to the purchaser than Pittsburgh. The practical result was to equalize prices by eliminating any competitive advantage of location, and thus to secure to Pittsburgh a share of the market it otherwise could not hold. Pittsburgh plus is an example of the single basing point system.

In the cement industry there is no need for a single basing-point system, for the product, by virtue of its bulk and its tendency to deteriorate, is consumed within a comparatively small distance from its point of production. Therefore, the cement industry, through its Institute, worked out a multiple basing point system with the basing points scattered about the country. While this elliptical description does not do justice to the intricacy of the device, the net effect on the consumer was substantially the same as under the Pittsburgh plus or single basing point system—prices quoted at any given point by "competitors" were identical to the fraction of a cent.

Justice Black's opinion makes completely illegal either the multiple or the single basing point system: "[C]oncerted maintenance of the basing point delivered price system is an unfair method of competition prohibited by the Federal Trade Commission Act."[37]

[35] FTC v. Cement Institute, 333 U.S. 683 (1948). For discussion of the basing-point system see Burns, Basing Point Systems, in The Decline of Competition 290–372 (1936); TNEC Monograph No. 42 (1941); Basing Point Pricing and the Anti-trust Policy, 55 Yale L. J. 558 (1946).

[36] FTC v. Morton Salt Co., 334 U.S. 37 (1948).

[37] FTC v. Cement Institute, 333 U.S. 683, 720 (1948). The opinion is of some interest apart from the substantive points involved as an example of the working application of the substantial evidence rule in the review of an administrative proceeding. The record before the Commission comprised 49,000 pages of testimony and 50,000 of exhibits. Briefs and appendices in the Supreme Court totaled 4,000 pages. The relative brevity of the Court's forty-

In a second FTC case the Court held that the Robinson-Patman Act and the Clayton Act forbid all cost discounts which are not justified by actual cost differences, even though theoretically all customers could buy enough to earn the discount. The latter argument is refuted by the obvious fact that only the great chains can buy in one year 50,000 cases of salt, the commodity involved in this case.[38]

The *Morton Salt* case illustrates the manner in which the substance of trade regulation depends upon matters of burden of proof and weight of evidence. The Court held that once the Federal Trade Commission has shown the existence of quantity price differentials, the burden of proof shifts to the company to show that the difference is justified by actual cost; and the Commission need find only that there is a "possibility," as distinguished from a "probability," that competition will be injured by the discrimination. The practical result of the substantive rule coupled with its procedural corollaries should be to carry out the congressional policy of forbidding quantity discounts to large purchasers unless justified by differences in cost.

b) Remedies and Procedure

The laws promoting domestic free trade are of course no better than the procedures and remedies which they provide. Although such procedures and remedies received more friendly treatment from the Court in 1947–48 than in the preceding term, the remedies are still generally inadequate.

In the *National City Lines* case[39] the issue was whether defendants in civil anti-trust litigation, brought either by the government or private persons, were entitled to ask application of the doctrine of forum non conveniens. Section 12 of the Clayton Act provides that suit may be brought under the anti-trust laws not only where the defendant is an inhabitant but also wherever it may be found or transacts business.

With the doctrine of forum non conveniens revitalized by two decisions at the 1946 term,[40] defendants in anti-trust cases argued that, despite Section 12, cases should be transferred out of the district in which they were brought. Since large anti-trust cases, whether brought by individuals claiming treble damages or by the government, usually involve many de-

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three page opinion was achieved by adhering rigidly to the rule that where questions of fact are involved the Court need only determine that the record contains some rational support for the findings.

[38] FTC v. Morton Salt Co., 334 U.S. 37, 41 (1948).

[39] United States v. National City Lines, Inc., 68 S. Ct. 1169 (1948).

[40] Koster v. Lumbermen's Mutual Co., 330 U.S. 518 (1947); Gulf Oil Co. v. Gilbert, 330 U.S. 501 (1947).

fendants, it is always easy to find some tenable reason for contending that, no matter where the suit is brought, it should have been brought somewhere else.

It would be hard to imagine a procedural device which would more effectively gut the application of the anti-trust laws than the intrusion of forum non conveniens into the field. These cases are always prolonged, and many of them would scarcely be worth bringing if the propriety of the forum had also to be litigated. But Justice Rutledge's majority opinion conclusively demonstrated that forum non conveniens had no application to Section 12. Justices Frankfurter and Burton dissented.

The year's most vigorous decision involving anti-trust remedies was that in the *International Salt* case,[41] unrelated to the *Morton Salt* discussed above. This was an anti-trust action brought by the United States to enjoin the defendant from conditioning the use of its patented machines on the use of its salt. Previous decisions[42] made inevitable the substantive holding that the practice was illegal.

The significant aspect of the case, however, was the decree itself, which not only forbade the tie-in arrangement but also provided that the machines must be leased on a uniform price or royalty basis. The defendant contended that since it had never engaged in discriminatory pricing, this clause should be eliminated. In rejecting this defense, Justice Jackson stated a sound principle which if applied generally (as it is not) would make the anti-trust laws effective. He said:

> In an equity suit, the end to be served is not punishment of past transgression, nor is it merely to end specific illegal practices. A public interest served by such civil suits is that they effectively pry open to competition a market that has been closed by defendants' illegal restraints. If this decree accomplishes less than that, the Government has won a lawsuit and lost a cause.[43]

The pricing provision was upheld to insure that the violator would relinquish his gains. Justices Frankfurter, Reed, and Burton dissented on this point.

In the *Paramount* movie case,[44] the government won a lawsuit but may have lost a cause. As noted above, the *Paramount* decision invalidated a host of restrictive practices in the movie industry. But by now the majors have secured such dominance by the practices rendered illegal that only the most drastic action can undo the damage done. Hence the district

[41] International Salt Co. v. United States, 332 U.S. 392 (1947).

[42] Particularly Morton Salt Co. v. G. S. Suppiger Co., 314 U.S. 488 (1941).

[43] International Salt Co. v. United States, 332 U.S. 392, 401 (1948).

[44] United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948); see text at note 25 supra.

court ordered that films be sold by competitive bidding. It chose not to require the majors to divest themselves of their exhibiting outlets.

The Supreme Court set aside the portions of the decree requiring competitive bidding, essentially on the grounds that the majors had become too strong for price competition and that the supervisory task for such a requirement was impossible. Justice Douglas' opinion is persuasive on these points.

But once it has been decided not to solve the problem by competitive bidding, it becomes imperative to solve it by divestiture. Otherwise the market will not be effectively pried open to competition. Justice Douglas recorded that an unnamed "majority of the Court" was unwilling to move so swiftly, and the case was therefore remanded for findings which may support action.

But while divestiture is foreshadowed by the Court, it is not ordered. The practical result of the case as it now stands is to stop certain practices but not to undo their results. And stopping them is not enough.

While 1947 was for the most part a year of enforcement of the laws concerning trade, the Supreme Court must do infinitely more if America is to be a land of "small producers, each dependent for his success upon his own skill and character." As the gradual spread of merger and consolidation strangles competition in America, the doom of our competitive economy is clear. It may be that the real resistance to that change in our economic system ought to come from other sources than the Supreme Court, and so five Justices declare. In any case, if free enterprise is to exist in America, the resistance to monopolization requires more dramatic vision than is displayed by those five Justices.

Remedies less than Herculean are so utterly inadequate that they should perhaps not be attempted at all. If the anti-trust laws can give no resistance to the engulfing of additional productive sources by United States Steel; if neither competitive bidding nor divestiture can be immediately imposed on the movie monopoly; if price fixing under patents has any legal protection; if the anti-trust laws do not require immediate and drastic sanctions in every context; then much of modern doctrine is merely a series of fleabites to the elephant of "unification."

Justice Douglas' dissent in the *Columbia Steel* case manifests the vigorous philosophy which must underlie any effective anti-trust enforcement:

> Power that controls the economy should be in the hands of elected representatives of the people, not in the hands of an industrial oligarchy. Industrial power should be decentralized. It should be scattered into many hands so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional

stability of a few self-appointed men. The fact that they are not vicious men but respectable and social minded is irrelevant. That is the philosophy and the command of the Sherman Act. It is founded on a theory of hostility to the concentration in private hands of power so great that only a government of the people should have it.[45]

OTHER PROBLEMS OF BUSINESS

There were several cases of general interest to the business community: a reminder that he who does business with the federal government is responsible for knowing what appears in the Federal Register;[46] a decision broadening the base for state regulation of natural resources;[47] an interpretation of the Food and Drug Act which puts it very much into the corner drugstore;[48] and other cases mentioned in the note.[49] But three matters

[45] 68 S. Ct. 1107, 1128–29 (1948). The real trouble with anti-trust law enforcement is that the "best people" are the principal violators of the anti-trust laws, and courts are hesitant to be severe under the circumstances. As sociologist Edwin H. Sutherland, the country's foremost student of upper-class offenses, observed in his article, Is "White Collar Crime" Crime? 10 Amer. Soc. Rev. 132, 137, 138 (1945): "From 1890 to 1929 the Department of Justice initiated 438 actions under this law (the Sherman Act) with decisions favorable to the United States. Of the actions against business firms and associations of business firms, 27% were criminal prosecutions, while of the actions against trade unions 71% were criminal prosecutions. . . . White collar crime is similar to juvenile delinquency in respect to the differential implementation of the law. . . . The stigma of crime has been less completely eliminated from juvenile delinquents than from white collar criminals because the procedures for the former are a less complete departure from conventional criminal procedures, because most juvenile delinquents come from a class with low social status, and because the juveniles have not organized to protect their good names."

[46] Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947).

[47] The dissenting opinion of Justice Rutledge, joined by Justices Black, Murphy, and Burton in Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 74–99 (1948), rejects the view that conservation is the only legitimate object of regulation of natural resources, and would permit regulation for purposes of general welfare. Justice Douglas concurred with the majority because of a jurisdictional point, but obviously agreed with the dissenters on the substantive question of power. Ibid., at 72.

[48] United States v. Sullivan, 332 U.S. 689 (1948).

[49] Maggio v. Zeitz, 333 U.S. 56 (1948), reviews the enforceability of bankruptcy turnover orders; Panhandle Eastern Pipe Line Co. v. Public Service Comm'n, 332 U.S. 507 (1947), further defines the boundaries of state and federal regulation of natural gas sales; United States v. Felin & Co., 68 S. Ct. 1238 (1948), deals with the price to be paid by the government when it requisitions a product in wartime which has a regulated sale value lower than its unregulated replacement value. In this case packers were forced to sell at a loss, since the OPA fixed the price of their sales but not of their purchases. Under those circumstances, Felin preferred to sell to old customers, rather than to the government, in order to keep good will. The government requisitioned his stock and contended that it need pay only the OPA price. Had this case been decided on its merits it would have been of enormous significance: A decision requiring payment of replacement value would mean that in any future war the government would be forced to regulate prices on pork, for example, from the litter to the table instead of relying on control at the end of the line to force down prices at earlier stages. For an excellent and thoroughly readable account of the problems of meat price regulation see Hyman and Nathanson, Judicial Review of Price Control: The Battle of the Meat Regulations, 42 Ill. L. Rev. 584 (1947). The opinion of Justice Frankfurter, joined by Justice Burton and the Chief Justice, found faults in the record which permitted escape from this serious question. Justices Reed, Black, and Murphy thought the OPA price proper; Justice Rutledge agreed with both

are of special significance. One is an important decentralization of the right to litigate with the government over commercial matters; another is the determination that the wartime Renegotiation Act is valid; and a third is the enlargement of some common-law notions of negligence.

a) Suits against the Government

Few of the year's opinions will have more pervasive effect than the determination in *Williams v. Fanning*[50] that Williams, owner of a weight reducing business in Los Angeles, could sue in the federal district court there to enjoin Fanning, the local postmaster, from carrying out a postal fraud order against him. The government immediately moved to dismiss on the ground that the Postmaster General was an indispensable party. Had the defense succeeded, the practical result would have been to require that the matter be litigated in the District of Columbia, where the Postmaster General could be served, rather than in California where he is out of reach of district court process.

The practical consequence of the application of the indispensable party rule to injunction suits against government officials is to drive the litigant to Washington. Of almost 3,000 such actions instituted between 1941 and 1947, one-third were brought in the District of Columbia.[51] This has a twofold effect: It adds the cost of Washington counsel to the expenses of litigation; and the cases are heard by judges in whose selection the Department of Justice has had a much stronger voice than in the selection of federal district judges in the states, where senatorial preferences must be respected.

These suits involve a wide range of governmental activity, particularly in the War, Navy, Postoffice, and Interior Departments. Two lines of cases had emerged[52] with decisions so unintelligible that in 1941 the Court conceded that it was not "an easy matter to reconcile all the decisions of

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the Frankfurter and Reed positions; and Justices Jackson and Douglas dissented in the belief that the replacement cost was a proper factor in computing value. The Jackson-Douglas position is more appealing than the others in view of the fact that the Fifth Amendment specifies "just compensation" without any particular formula. If it is "just" to require a presumably honest dealer to sell to the government at a price fixed by the government which is less than the current market value for replacement or the actual market value at time of original acquisition, the reason escapes the eye.

[50] 332 U.S. 490 (1947).

[51] Indispensable Parties in Injunction Suits against Federal Administrative Officers, 23 Ind. L. J. 305 n. 1 (1948). This note is an excellent review of the Williams case and of the entire subject of which it is a part.

[52] The earliest Supreme Court cases requiring joinder were Warner Valley Stock Co. v. Smith, 165 U.S. 28 (1897), and Gnerich v. Rutter, 265 U.S. 388 (1924). The leading case permitting non-joinder was Colorado v. Toll, 268 U.S. 228 (1925).

the court in this class of cases."[53] The Ninth Circuit, most distant from Washington, struggled particularly to determine when the local courts might proceed against federal officers.[54]

In the *Williams* case Justice Douglas identified the two lines of cases and observed cheerfully that "the distinction we have noted between these two lines of cases apparently was not as clear to others as it seems to us."[55] Indeed it was not; but it matters no longer. For Justice Douglas has devised a new rule: The suit may be brought locally against a local officer "if the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court."[56] Here the decree sought would require the local postmaster to stop interfering with Williams' mail and to honor money orders payable to Williams. "The decree in order to be effective need not require the Postmaster General to do a single thing—he need not be required to take new action either directly . . . or indirectly."

Hereafter, any intelligent lawyer should be able, in substantially every injunction case, to draw his prayer for relief in such fashion that it works itself out on the local official. The result will be greater freedom for regulated interests to complain and still stay at home. To the extent that policy differences exist between local and District of Columbia federal judges, it gives the plaintiff a choice of forums. It gives the occasional incompetent federal district judge—and there are a few today—far greater power over policy than he had before.

Nonetheless, the decision is wholesome and in accord with the contemporary policy of decentralization.[57] Most federal district judges are at least as competent custodians of national policy as their brethren in the District. The Government is equipped through the United States Attorney's offices to litigate anywhere, and private parties are not.

b) Renegotiation

The problem of profit control has plagued the country during every major war.[58] The decision in the *Bethlehem Steel* case,[59] involving World

[53] Brooks v. Dewar, 313 U.S. 354, 359 (1941).

[54] The leading Ninth Circuit case was Neher v. Harwood, 128 F. 2d 846 (C.C.A. 9th, 1942).

[55] Williams v. Fanning, 332 U.S. 490, 494 (1947).

[56] Ibid.

[57] Indispensable Parties in Injunction Suits against Federal Administrative Officers, op. cit. supra note 51, at 313 collects several examples of the trend toward decentralization.

[58] On World War I experience, see Hensel and McClung, Profit Limitation Controls Prior to the Present War, 10 Law & Contemp. Prob. 187 (1943). On Civil War experience, see Frank, Recapturing War Profits—A Civil War Experience, 1947 Wis. L. Rev. 212.

[59] United States v. Bethlehem Steel Corp., 315 U.S. 289 (1942).

War I profits, decided shortly after Pearl Harbor, made it clear that if the government wanted to be able to control war profits in World War II, it should act at once and not wait twenty years for law suits.

Within two months of the *Bethlehem Steel* case, Congress passed the First Renegotiation Act, approved April 28, 1942. The Act was amended in October 1942 and frequently thereafter. The statute's basic assumption was that war procurement was so gigantic and so far outside previous experience that prices could only be guessed at in advance. The Act provided, therefore, that whenever on the basis of actual experience it appeared that either a prime or subcontractor was making "excessive profits," the government might recoup them by specified means.[60]

While a number of constitutional questions were presented in the renegotiation cases at the 1947 term, the two which were most important dealt with the problems of improper delegation and retroactivity and related only to the original Act of 1942. The first Act instructed the Secretary of each Department, "whenever in his opinion excessive profits have been realized" to renegotiate the contracts involved and to withhold such "excessive profits." "Excessive profits" were not defined. In the October 1942 amendment, however, Congress added the following unilluminating definition: "The term 'excessive profits' means any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits." Not until 1944 was a real definition written into the Act. Not unnaturally, the contractors argued that the lack of standards made this an unconstitutional delegation of legislative power.

Justice Burton's opinion holding the Act valid in this respect confirms the general suspicion that the only two Supreme Court decisions which ever invalidated delegations to the executive branch of the government[61] were probably wrong. The usual attitude of the Supreme Court is one of great leniency toward the congressional effort to be articulate in its command to the executive branch; and particularly where, as here, it is difficult to be explicit, the statute will be upheld.

The question of retroactivity is considerably more difficult, and the opinion of the Court is disappointing in its failure to discuss the subject. The Act of April 28, 1942 was made applicable to all contracts entered into but not completed before the Act's passage, and on April 28 there were at least $50,000,000,000 of sub and prime contracts outstanding. If the

[60] The various renegotiation acts are collected in an appendix to Justice Burton's opinion in Lichter v. United States, 68 S. Ct. 1294, 1320 (1948).

[61] Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), and Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

conceptions of the Contract Clause are included within Fifth Amendment due process, there is room for a most reasonable difference of opinion as to whether the subsequent alteration of the terms of those sub and prime contracts was valid.

The government brief devoted twenty pages to discussion of this point, cited fifty cases, and proposed several theories. The opinion of the Court is forty-nine pages long. Yet the Court disposes of the retroactivity problem without citing cases, without discussing any theories, and with only a cursory statement identifying the problem and declaring the Act valid.[62]

These cases involved subcontracts. Had they been concerned with prime contracts, it would appear from *Lynch v. United States*[63] and the *Gold Clause* cases[64] that the Constitution might limit the federal government's power to impair its own contracts, so that the Act might be invalid unless those cases were re-examined. As to subcontracts, the Act can be upheld on a variety of theories typified by *Norman v. Baltimore & Ohio R. R.*,[65] *Home Bldg. & Loan* v. *Blaisdell*,[66] or *Veix v. Sixth Ward Bldg. & Loan Co.*[67] Each represents a different theory, and we are not advised whether the Court picked one or another.

Although Justice Burton's opinions may be criticized from time to time, few are likely to contend that they are not thorough—indeed, thorough to a fault. When, therefore, in a case of this magnitude, Justice Burton omits substantially all discussion of the most critical issue, we are left with the probable deduction that the Court knew that the Act was valid but was unable to agree on a reason.

c) Torts

As interpreter of various federal statutes regarding injured workmen, the Supreme Court has become a formulator of general tort law. In this area the rule of *Erie v. Tompkins* does not apply, and the Court bases its decisions on general rather than local law. Although these decisions are binding nowhere except in the application of these federal statutes, they nonetheless are somewhat persuasive to other courts dealing with quite independent negligence problems. An example is the case of *Jesionowski v. Boston & Maine R. R.*[68] at the 1946 term, which stated some fairly novel

[62] Lichter v. United States, 68 S. Ct. 1294, 1318 (1948).

[63] 292 U.S. 571 (1934).

[64] Perry v. United States, 294 U.S. 330 (1935).

[65] 294 U.S. 240 (1935).

[66] 290 U.S. 398 (1934).

[67] 310 U.S. 32 (1940).

[68] 329 U.S. 452 (1947). For an example of the application of the rule in a non-Federal Employers' Liability Act situation, see Conover v. Hecker, 317 Mich. 285, 26 N.W. 2d 774 (1947).

views on res ipsa loquitur, views which have reappeared in contexts quite aside from the federal statutes.

Hence, as possible forecasts of subsequent developments in the general field of negligence, the tort decisions at the 1947 term are worth listing:

1. Deceased, an employee, fell off a moving train through no fault of the carrier. The Court held that his heirs may recover if the carrier "carelessly and negligently" for "an unnecessarily long period of time" failed to institute a search for the missing man. In short, the carrier had a duty to rescue a person whose predicament was not its fault.[69]

2. The doctrine of res ipsa loquitur applies in an employee's suit against his employer for the deeds of a fellow-servant, despite the fact that the employer had no control over the particular act of the fellow-servant. Where plaintiff was hit by a falling block, "the falling of the block is alone sufficient for an inference that the man who held the block was negligent."[70]

3. The plaintiff worked a night shift in a small building in an isolated part of defendant's railroad yards. She was wilfully beaten late one night by a man who forced his way into the building. Held, that the jury should determine whether such dangers were foreseeable, and if they were the employer was liable for the criminal act of the stranger.[71]

III. CIVIL RIGHTS

There were approximately three dozen civil rights decisions at the 1947 term of the Supreme Court, many of them brave and some of them important. But in this year the battle for human liberty was preponderantly outside the Supreme Court, and the battle was being lost on many fronts. The work of the Court must be seen against the temper of the country, for many large issues were before the Congress, the administration, and the candidates struggling for popular favor at the polls.

Between October 1947 and June 1948 these issues assumed nation-wide prominence in varied forms. The President presented to Congress a program intended to secure certain rights of civilization, as well as of the Constitution, for American Negroes. His program, after causing a revolt which disrupted his own party, was quietly allowed to die by the opposing majority party. Congress passed the Displaced Persons Bill, which embodied an immigration policy characterized by its opponents as a willful discrimination against the two largest religious minorities in America. Apparently little stood in the way of "outlawry" of the Communist party

[69] Anderson v. Atchison, T. & S.F. Ry. Co., 333 U.S. 821 (1948).

[70] Johnson v. United States, 333 U.S. 46 (1948).

[71] Lillie v. Thompson, 332 U.S. 459 (1947).

until another party's courageous candidate for the Presidency staked his chances for the Oregon primary vote, and ultimately for the nomination, on his opposition to such repression.

In Washington hysteria reached previously unequalled heights. The government continued its efforts to purge itself of civil servants who might ever have associated, however innocently, with Communists. The procedures adopted might well have been borrowed from Fascists or from the Communists themselves—nothing like it had ever before been seen in a democracy. Government employees were hailed before boards and told to clear themselves of "guilt by association." They were given no comprehensible charges and never learned the identity of the witnesses against them. Confrontation or cross-examination of their accusers was unheard of.[72]

Happily for the record of the profession, there were some lawyers who spoke out against the tide. John Lord O'Brian decried these secret inquisitions of the government, calling upon the Bar to find answers to questions which for him were clearly rhetorical:

> How far, if at all, should we tolerate a policy of having our government officials build up, through secret investigations, these enormous numbers of secret dossiers dealing with the private lives of the people? For sound historical reasons the founding fathers dreaded above everything else secret activities in government operation. Must we take a different view? Is this aberration from the principles guaranteeing the privacy of the individual justified by any substantial proved facts? May not all of his agitation turn out, as after the first World War, to be an unreasonable and unworthy result of emotional instability? These are some of the questions that now lie upon the conscience of the legal profession.[73]

Against the background of the rest of the government, the Supreme Court from October 1947 to June 1948 looked very good.

The Supreme Court may never have the opportunity to pass upon the secret trials of government employees, but *In re Oliver*[74] made very clear the Court's attitude on the fundamentals of procedural due process. Under the Michigan one-man grand jury system, a trial judge may serve as a

[72] See Andrews, Washington Witch Hunt (1948).

[73] O'Brian, Loyalty Tests and Guilt by Association, 61 Harv. L. Rev. 592 (1948). The law-teaching profession may take great pride in the letter to the House Un-American Committee prepared by Professor Walter Gellhorn of Columbia for the American Civil Liberties Union and signed by a great number of law teachers. The letter asked that in proceedings before that Committee the defendants be given an opportunity to answer charges against them; that they be permitted to call witnesses; that they should be fully informed of the charges against them; that they be allowed counsel; that hostile testimony be subject to "reasonably limited cross-examination"; and that the judgment of the Committee should be based on "material presented at the hearing and should not rest on undisclosed material in the Committee's files."

[74] In re Oliver, 333 U.S. 257 (1948).

grand jury to investigate crimes. The judge may also punish for contempt witnesses who do not satisfactorily answer non-incriminating questions. Oliver's answers in such a secret proceeding did not satisfy the judge-jury, who immediately proceeded to sentence him for contempt. The entire summary proceeding took place with the public excluded and with Oliver having no opportunity to seek the aid of friends or counsel. In the Supreme Court's reversal of Oliver's conviction, Justice Black traced the history of secret trials, showing that they had been intolerable to Anglo-American jurisprudence at least since 1641. "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel."[15]

Recognition of Oliver's constitutional rights is not the only difference between the treatment accorded the Michigan practice here held invalid and the federal government's practice in its loyalty cases. Oliver's punishment, set aside by the Supreme Court, had been a sixty-day sentence. A government economist discharged for guilty associations loses the means of support for his wife and children and has a reputation so blasted that he may never again be able to obtain work within the scope of his profession. Another passage of the *Oliver* case gives ground for contemplative comparison:

> The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the *lettre de cachet*. All of these institutions obviously symbolized a menace to liberty. In the hands of despotic groups each of them had become an instrument for the suppression of political and religious heresies in ruthless disregard of the right of an accused to a fair trial.[16]

The number of civil rights cases at the October 1947 term was so great that, despite the real interest of most of them, any survey of the group would be far from fascinating reading. For the most part, therefore, discussion will be reserved for the novel developments, and those which might clearly have been anticipated will be put aside.

[15] Ibid., at 273. The statement obviously needs qualification to reflect the views of the Court majority, since five of the Justices made clear elsewhere that a more accurate statement would be: "These rights include, as a minimum, a right to examine witnesses against him, to offer testimony, and to be represented by counsel, PROVIDED that an American citizen may have these rights in state courts only if he has enough money to pay for them, and if he is poor he shall go without." Betts v. Brady, 316 U.S. 455 (1942), reaffirmed in Bute v. Illinois, 333 U.S. 640 (1948).

[16] In re Oliver, 333 U.S. 257, 268–70 (1948).

Most decisions concerning criminal procedure were foreshadowed in the previous term's opinions. For example, five members of the Court reaffirmed the doctrine that counsel, even though requested by the petitioner, is not a general constitutional prerequisite to a fair trial in a state criminal proceeding.[77] This was at least not new error. The Court also, by the same thin margin, held that very few particular cases fell within the exception to the general rule.[78]

One can but hope that eventually the Court will overrule *Betts v. Brady*,[79] and its successor case at the 1947 term, *Bute v. Illinois*,[80] and hold that the right to counsel is a requirement of civilized society in any serious criminal case. Such an overruling need not, as is sometimes feared, result in a general delivery of the jails in those few states which have not previously allowed counsel. An extensive analysis of the literature by Justice Gilkison of the Indiana Supreme Court during the past year is a reminder that a decision overruling a constitutional precedent may be made prospective if circumstances warrant.[81]

More surprising than the right to counsel cases was the opinion by Justice Frankfurter, with Justices Black, Douglas, Murphy, and Rutledge dissenting, that the Attorney General might order deportation of aliens for Nazi sympathies without any judicial review whatever.[82] The only bright spot is that this particular deportation program was administered in the Department of Justice by a group unusually sensitive to civil rights, so that in all likelihood few injustices resulted.

Elsewhere the Court saw oppression and hit hard. A number of decisions dealt with racial discriminations; of these, the restrictive covenant cases concern the largest portion of the population.[83]

[77] Bute v. Illinois, 333 U.S. 640 (1948).

[78] The Bute case and Gryger v. Burke, 68 S. Ct. 1256 (1948), held counsel unnecessary; Townsend v. Burke, 68 S. Ct. 1252 (1948), and Wade v. Mayo, 68 S. Ct. 1270 (1948), held counsel necessary.

[79] 316 U.S. 455 (1945).

[80] 333 U.S. 640 (1948).

[81] Swank v. Tyndall, 78 N.E. 2d 535 (Ind., 1948).

[82] Ludecke v. Watkins, 68 S. Ct. 1429 (1948).

[83] Another race-prejudice case of considerable interest to the law school world was Sipuel v. Board of Regents, 332 U.S. 631 (1948), holding per curiam that when a Negro applied for legal education at the University of Oklahoma Law School, there then being no other state law school, "[t]he State must provide it for her in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group." Thereupon Oklahoma created overnight a new law school for Negroes, and the same case was brought back as Fisher v. Hurst, 333 U.S. 147 (1948), with a request for an order that the state comply more adequately with the Supreme Court's mandate. The court necessarily held that on the record before it the adequacy of the new school could not be considered. The case thereupon was remanded to provide a record on the adequacy of the new school. The resulting trial included courageous testimony by Dean Page Keeton of the Oklahoma University Law School condemning the "quickie" school as a mere subterfuge, and by Henry Hubbard Foster,

The decision forbidding enforcement of restrictive covenants aimed at racial minorities was the most important case of the year in terms of legal theory.[84] Paradoxically, its practical consequence in the immediately foreseeable future will be small.

A restrictive covenant is an agreement, made either among the landowners of an area or between a vendor and purchaser of land, usually prescribing that no person "not of the Caucasian race" may purchase or occupy the restricted property. Hitherto, enforcement has been in equity to restrain a sale in violation of a covenant, to require that land which has been sold in violation of a covenant be forfeited, or to restrain occupancy. The proceeding is usually brought by a neighbor who objects to the new occupant.

The history of the device is well documented elsewhere and will not be repeated here.[85] In *Buchanan v. Warley*[86] the Supreme Court held invalid an ordinance of the city of Louisville which provided in substance that Negroes and white persons should not live in the same block. The basis of invalidation was partly due process of law and partly a post-Civil War statute providing that all citizens of the United States should have the same rights as white citizens to purchase, hold, and convey real property.[87]

This decision resulted in the widespread use of restrictive covenants to achieve the result which, under the *Buchanan* rule, could not be achieved by a municipal ordinance. The theory of those defending the covenants was that under the doctrine of the *Civil Rights* cases, the Fourteenth Amendment restricts only state action and does not limit private or individual discriminations. This point of view received implicit acceptance in *Corrigan v. Buckley*.[88]

In the current restrictive covenant cases Chief Justice Vinson discov-

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Jr., of the Oklahoma faculty, who described the new school as "a fake, a fraud, and a deception." Witnesses from other schools who testified to the inadequacy of the new school were Dean Griswold of Harvard and Professors Bunn (Wisconsin), Gellhorn (Columbia), and Sharp (Chicago). Two American Bar Association officers, Joseph A. McClain and Dr. Hervey, testified in support of the new school. Counsel for Miss Sipuel included Professor William Robert Ming of the Chicago faculty.

[84] Shelley v. Kraemer, 334 U.S. 1 (1948); Hurd v. Hodge, 334 U.S. 24 (1948). The Hurd case, involving problems peculiar to the District of Columbia, will not be discussed here, and many secondary theoretical problems in both cases will also be excluded because of space limitations.

[85] The leading work is McGovney, Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds Is Unconstitutional, 33 Calif. L. Rev. 5 (1945).

[86] 245 U.S. 60 (1917).

[87] 14 Stat. 27 (1866), 8 U.S.C.A. § 42 (1940).

[88] 271 U.S. 323 (1926).

ered that *Corrigan v. Buckley* had not decided anything except that private agreements to discriminate were not as such invalid under the Fourteenth Amendment. "Nor was the question of the validity of court enforcement of the restrictive covenants under the Fifth Amendment properly before the Court, as the opinion of this Court specifically recognizes."[89]

Thus freed of precedent, the Court held that the action of state courts and of judicial officers in their official capacities was state action and therefore that the judicial enforcement of restrictive covenants violated the Fourteenth Amendment even though the covenants themselves did not.

While the distinction of *Corrigan v. Buckley* is more ingenious than real,[90] for practical purposes the decision is gone and will not be mourned here. A judicial decree is equivalent to the Louisville ordinance, and it would have been hair-splitting indeed to say that a state may do through its courts what it may not do through its legislature.

And yet some hair-splitting is sure to follow and eventually will be necessary. The logical application of the principle announced in these cases will subject to constitutional limitations a number of activities never previously regarded as so controlled.

Assume that the doctrine of the restrictive covenant cases is that a court may not by its decree achieve a discriminatory result which a state could not order by direct legislative action. It would then follow that whatever would be violation of constitutional rights if done by statute is also a violation of constitutional rights if done by decree.

Take, for example, *Marsh v. Alabama*.[91] The *Marsh* case held that a state statute was invalid in its attempted application to prohibit an individual from distributing religious literature on the streets of a company-owned town. The following questions arise:

1. If the company police had, instead of causing Marsh to be prose-

[89] Shelley v. Kraemer, 334 U.S. 1, 8 (1948).

[90] The same argument successful in these cases was pressed upon the Court by counsel in the brief in the Corrigan case, and the Court disposed of the argument with the phrase "it likewise is lacking in substance." Corrigan v. Buckley, 271 U.S. 323, 331 (1926). While the meaning of that phrase is open to some quibbling (see United States brief in the 1948 restrictive covenant cases, at 89–92), the fact remains that a series of District of Columbia decisions thereafter had construed the phrase as an adverse decision on the state action theory, and certiorari had been denied in all of them. The most recent of that series is Mays v. Burgess, 147 F. 2d 869 (App. D.C., 1945), cert. den. 325 U.S. 868, 896 (1945). Great credit is due the foresight, scholarship, and courage of Justice Edgerton of the District of Columbia Court of Appeals who led the way to the new rule in his dissent in the Mays case.

[91] 326 U.S. 501 (1946).

cuted, sought an injunction to restrain her "trespass" upon their property, would a judgment of the state Supreme Court that the common law of Alabama permitted such an injunction have been subject to federal judicial review?

2. Suppose instead of the foregoing suit brought by the company police, Marsh had sought the injunction to restrain the company police from interfering with her access to the town and that this relief had been denied. Would denial of the relief on common law grounds have presented a federally reviewable question?

3. Suppose that instead of resorting to the courts, the company police had utilized self-help and had evicted Marsh bodily from the premises. If Marsh then sued in tort for damages in an Alabama state court, would a judgment denying her damages on the ground that she was a trespasser have been subject to federal judicial review?

If we take the interpretation of the restrictive covenant cases assumed above, then all three questions receive affirmative answers and it can rationally follow that the entire realm of common law interpretation by a state will be subject to federal judicial review. It is doubtful that the Court meant to go so far, and some theory of limitation will emerge. Yet this will not be easy if logic is to be maintained. That a limitation is intended is indicated by the firm emphasis with which the Court went out of its way to reaffirm the *Civil Rights* cases[92] and to declare that the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful." This is the most seriously disappointing aspect of the opinions, for it was wholly unnecessary to reaffirm the *Civil Rights* cases, and the issues presented in them deserve reconsideration upon argument which is directed squarely to the issue. The dissenting opinion of Justice Harlan in the *Civil Rights* cases has never been satisfactorily answered, and the current decision buries it even deeper in oblivion.

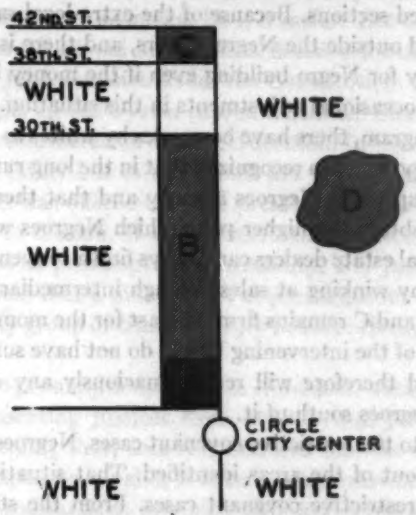
As a practical matter the restrictive covenant cases are more largely a contribution to long-range education than to an immediate solution of the Negro housing problem. True, the first reaction of litigant McGhee was, "We have a mighty fine little home here and we didn't want to lose it."[93] But such cases are rare. An examination of the situation in Indianapolis illustrates that in many cities the restrictive covenants are so firmly supported by extra-legal sanctions that the covenants themselves are of no great significance.[94]

[92] 109 U.S. 3 (1883). [93] Louisville Courier Journal, p. 1 (May 4, 1948).

[94] The text discussion is based on facts learned in informal conversations with experts on the Indianapolis situation. A flood of schemes have been proposed for avoiding the effect of the

As the following diagram shows, the Negro population of Indianapolis is located principally in two sectors, one (A, B, and C) north and west of the Circle in the center of the city and the other (D) to the northeast of the same area. Sector A is now regarded as a blighted area in which some 450 families live almost bordering the grounds of the state capitol without modern plumbing or sewage facilities. The sector marked as area B contains the bulk of the Indianapolis Negro community and includes a considerable area of fairly satisfactory, though greatly overcrowded, housing.

DIAGRAM OF LOCATION OF WHITE AND NEGRO POPULATION IN INDIANAPOLIS



Area C is one into which Negroes have been gradually moving in recent years.

The real pressures which are keeping the Negro population in Indianapolis cooped up within these sectors are not provided by restrictive covenants but by three other factors. The "code of ethics" of the real estate dealers forbids them to sell to a Negro property outside the marked areas. Should an individual white householder choose to make a direct sale to an individual Negro purchaser without the intervention of a real estate agent, the Negro would be unable to obtain credit for a mortgage. Should

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decisions, and the sheer volume of these concoctions suggests that in some areas at least a more immediate effect is anticipated. One such proposal seriously considered in the District of Columbia was a scheme for giving one person an option on all property in a block which could be exercised if there should be a likelihood of sale to an "undesirable." Washington Post, sec. B, p. 1 (June 5, 1948).

the sale be from a white seller to a Negro purchaser, and should the Negro purchaser have cash on hand, the community pressure against the white seller as soon as the proposed sale became known would be so strong that the sale would never be consummated. Local organizations implement these neighborhood controls.

The consequence is that the restrictive covenant becomes the fourth line of defense for entrenched prejudice. In Indianapolis there has not been a single instance in many years in which the Negro purchaser got through to the fourth line of defense. In other words, in Indianapolis there are no suits to enforce restrictive covenants because there are no sales outside the permitted sections. Because of the extra-legal sanctions a Negro also cannot build outside the Negro sectors, and there is as a result very little opportunity for Negro building even if the money is available.

But there are occasional adjustments in this situation. For example, in area C on the diagram, there have been sales by whites to Negroes in cases where the white population recognized that in the long run the land would probably be occupied by Negroes anyway and that there was a present opportunity to obtain the higher price which Negroes would pay out of necessity. The real estate dealers can always find a convenient way around their own code by winking at sales through intermediaries. Yet the line between areas B and C remains firm, at least for the moment, because the white occupants of the intervening blocks do not have sufficient means to go elsewhere and therefore will resist tenaciously any crossing of 30th Street by the Negroes south of it.

In sum, prior to the restrictive covenant cases, Negroes in Indianapolis could not move out of the areas identified. That situation is in no wise changed by the restrictive covenant cases. From the standpoint of the Negro population, it is not very important whether the current decisions can be frustrated by some new form of legal arrangement, since such arrangements are unnecessary. Yet the decision is of tremendous importance. It is not only heartening but it may be a contribution to the educational process by which the Emancipation Proclamation may in some distant era become a reality.

Discriminations against Japanese Americans, and discriminations against Japanese within our borders, have long been a blot on American constitutional traditions. This year the Supreme Court struck down two more of these racial barriers.

The *Oyama* decision[95] invalidated a California statute which forbade

[95] 332 U.S. 633 (1948).

"aliens ineligible for citizenship" (a euphemism for Japanese) from acquiring agricultural lands in that state. Should a Japanese violate this statute by buying a farm, the property might escheat to the state. In this case, Oyama Senior, a Japanese, provided the payment for two land sales nominally made to his minor son, an American citizen. Title was in Oyama Junior, but Oyama Senior managed the properties as his guardian.

In anticipation of just such cases, the California statute provided that the property should escheat if transfers were made with "intent to prevent, evade, or avoid" escheat, and then added a presumption clause that an intent to "prevent, evade, or avoid" would be presumed when an ineligible alien paid the consideration for a transfer. The California statute had been held constitutional in 1922 in a decision focusing primarily on the rights of the Japanese alien under the Constitution.

Counsel brought up the *Oyama* case in a manner which permitted but did not require reconsideration of the old decision. In *Oyama* the rights not only of the alien father but of the citizen son were presented, and an ingenious argument was offered that the presumption denied equal protection of the laws to the son. If other Americans received gifts from their fathers, there was no presumption of invalidity, and Justice Vinson for a majority of six held that a different set of presumptions could not be applied to a minority group of citizens simply because their parents had been Japanese.

The validity of presumptions as a rule of evidence rests on their reasonableness, and dissenting Justices Reed, Burton, and Jackson had strong ground for contending that, once it is assumed that the original discrimination against Japanese is valid, it is eminently reasonable to apply this presumption to transactions in which they are involved. Chief Justice Vinson and Justice Frankfurter in the majority did not challenge that underlying assumption, preferring to rely on the presumption point rather than overruling the earlier case on its merits.[16] Justices Black, Douglas, Murphy, and Rutledge accepted the presumption argument of the Chief Justice but also believed that the earlier case should have been overruled on its merits.

If the majority view leaves room for quibbling with its logic, it does not disappoint as to its result. Although technically, in view of the narrow

[16] Speculation has arisen as to why, if these two Justices didn't care to face the issue squarely, they should have chosen this particular technicality instead of an easier one. For example, Oyama's counsel also argued that the field had been occupied by the federal government since the earlier cases. However, persons present in the courtroom at the time of argument report that Mr. Dean Acheson, counsel for Oyama, stressed the presumption theory with great persuasiveness and ability in his oral argument. Counsel's emphasis may account for this element of the case being foremost in the minds of these Justices.

decision, California might have proceeded in whatever escheat actions remained in which citizen sons were not involved, the California Attorney General chose to relinquish the field and immediately canceled all statutory escheat actions.[97]

The wisdom of his judgment was confirmed later in the term by the *Takahashi* decision,[98] in which Justice Black wrote the opinion invalidating a California statute forbidding fishing by aliens ineligible for citizenship. While the Court noted a distinction between the 1922 decision on the land law—still not technically overruled but obviously drained of strength—and the instant case, the distinction was only the fairly obvious one that one statute dealt with land and the other with fish. The fishing statute was flatly invalidated on its merits as a denial of equal protection, Justices Reed and Jackson dissenting.

Three other important developments in the field of civil rights have little in common but their importance. They were the growth of the law in respect to searches and seizures, labor unions' expenditures of funds for political purposes, and religion in the schools.

At the 1946 term, the Court in *Harris v. United States*[99] had appeared to sanction the complete ransacking of a man's house by police without a warrant on the occasion of an arrest. The decision there was five to four, with the Chief Justice writing the majority opinion. At the 1947 term, in *Trupiano v. United States*,[100] the Court very narrowly limited the *Harris* doctrine, again by a five-to-four margin, and the Chief Justice felt so strongly about the stunting of his brain child that he wrote his only dissenting opinion since coming to the Court.

In *Trupiano* government agents without either arrest or search warrants arrested the operators of an illegal still and seized "a still, alcohol, mash and other equipment." Since the raid had long been planned and a government operative had been posing as a member of the criminal gang, there was no conceivable reason for the lack of warrants.

Because the arrest was made when the still was in operation, and the criminal activities of the defendants were clearly visible from outside the distillery, the arrest itself was approved despite the lack of an arrest warrant. Law enforcement officers may arrest for a felony committed in their presence without a warrant. But the seizure was disapproved despite the

[97] "Despite the partial victory, Japanese-Americans in California were jubilant. Over fifty other legal attempts by the State to escheat land similarly held by Nisei were abandoned. Attorney General Fred N. Howser of California announced that the State would drop its efforts." 17 Civil Liberties Quarterly 1 (1948).

[98] Takahashi v. Fish and Game Comm'n, 68 S. Ct. 1138 (1948).

[99] 331 U.S. 145 (1947).

[100] 68 S. Ct. 1229 (1948).

fact that the objects seized were in open sight around the first person arrested. The traditional rule that objects may be seized which are related to the crime and in plain sight at the time of arrest was ignored on the ground that it was mere accident that the first criminal arrested was surrounded by his paraphernalia—"Antoniole might well have been outside at that particular time," and the immunity from search without a warrant cannot depend "upon such a fortuitous factor as the precise location of Antoniole at the time of the raid."[101]

The extent to which the *Harris* case outlives *Trupiano* is reserved by the Court. To the extent that the *Harris* rule still exists, widespread searches without warrants may follow from arrests, and therefore the *Harris* minority is alert to constrict the legality of the arrest itself when a search is also involved. In this Justice Douglas of the *Harris* majority joined the dissenters, and the result was two decisions narrowly defining the power to arrest without a warrant.[102] This is unfortunate to the extent that the law of arrest is manipulated to avoid the consequences of the *Harris* decision as to search. The only really happy solution to that problem would be the overruling of the *Harris* case.

Another highly important civil rights case was the decision holding that labor unions may continue to use union newspapers to exhort their members to desired political activity. Use of union funds for this purpose was held by Justice Reed for the Court not to be an "expenditure" within the meaning of the Taft-Hartley prohibition on expenditures of union funds for political purposes.[103] Finding this meaning in the Taft-Hartley Act required some tall construction, and a reading of both the legislative history and the indictment will probably not persuade most readers of the opinion. But no matter; the larger significance of the case, aside from the eminently practical application of the interpretation in the 1948 elections, is the discussion of the constitutional limitation on the power of Congress to put restrictions of this sort on publications.

Five Justices reached their result as a matter of statutory interpretation qualified to the extent explained below. Justice Rutledge, concurring

[101] Ibid., at 1233–34.

[102] United States v. Di Re, 332 U.S. 581 (1948); Johnson v. United States, 333 U.S. 10 (1948). A case involving an important point related to search and seizure was Shapiro v. United States, 68 S. Ct. 1375 (1948), holding that production of records required to be kept by law does not give immunity from prosecution to their producer either under the Constitution or under the standard immunity provision of government statutes. The issue is very difficult as well as important and is thoroughly considered in the majority opinion by the Chief Justice and the dissent by Justice Frankfurter. Justices Murphy, Jackson, and Rutledge also dissented.

[103] United States v. CIO, 68 S. Ct. 1349 (1948).

in the result with Justices Black, Douglas, and Murphy, interpreted the statute to forbid the activity but thought the statute itself void.

The problem is a serious one. In the last fifteen years, the expansion of labor unions has been accompanied by a vast enlargement of both the scope and the weight of their political activities. These activities have had the twofold effect of enlightening the voters and increasing the size of the vote. Those whose careers in politics have suffered from or been endangered by this political program have been alert to find reasons and means for its repression. The principal reasons put forward have been the desire to prevent unions from exerting excessive weight in national affairs and to prevent the funds of dissenting union members from being used for political activities of which they might disapprove. The device chosen was the prohibition of "expenditures" for political purposes.

The concurring Justices flatly disbelieved that the real object of the legislation was the protection of union members from the exploitation of their funds by their officers. Justice Rutledge put it bluntly:

> [The] object was rather to force unions as such entirely out of political life and activity, including for presently pertinent purposes the expression of organized viewpoint concerning matters affecting their vital interests at the most crucial point where the expression would become effective.[104]

The tool of invalidation lay in the excessive scope of the regulation in relation to its objects. If excessive influence had really been feared, the statute might have controlled union electioneering without prohibiting it. If minority protection was the real object, "it would be sufficient for securing this to permit the dissenting members to carry the burden of making known their position and to relieve them of any duty to pay dues or portion of them to be applied to the forbidden uses without jeopardy to their rights as members."[105] In any case, the statute was too indefinite.

All this is four-man theory, and it takes five to make a majority. But the majority too declared that if the section prohibited publication of periodicals advising union members or corporate stockholders of matters concerning their interests, "the gravest doubt would arise in our minds as to its constitutionality."[106]

The underlying social problem is of the gravest significance as we swing from the New Deal to the renovated Old. There is obviously a strong appeal to the new in-group in both major parties to retain or broaden their power by making political eunuchs out of those who might oppose them. The Hatch Act and the Taft-Hartley Act are very much in point. Congress

[104] Ibid., at 1371. [105] Ibid., at 1370. [106] Ibid., at 1357.

might well hold in mind the adjuration of the concurring Justices respecting free and full discussion and free assembly:

> The most complete exercise of those rights is essential to the full, fair and untrammeled operation of the electoral process. To the extent they are curtailed the electorate is deprived of information, knowledge and opinion vital to its function.[107]

One last civil rights case: Last year this writer said of the 1946 term decision in the *Everson* case,[108] "It would seem to follow from both the majority and minority opinions that the use of public school buildings for any type of religious education would be precluded as direct aid."[109] In the *McCollum* case[110] this year, Justice Black's majority decision applied the principles of the *Everson* case to invalidate the use of Champaign, Illinois school buildings in conjunction with the Champaign system of compulsory school attendance as a means of affording religious education. School teachers distributed cards on which parents could designate the religious training, if any, they desired their children to receive. Classes were held in the school buildings once a week by religious instructors who were not paid by the state, and attendance in accordance with the parents' wishes was compulsory. Those children whose parents preferred that they should not have religious education participated in required secular education at the same time.

The opinion of the Court consisted substantially of a quotation from the *Everson* case and a refusal to overrule it. The *Everson* case had held, inter alia, that American traditions required separation of church and state, and that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."[111] The Court in substance held in the *McCollum* case that when the state uses its compulsory educational processes to round up the communicants, enforces their presence, and furnishes the building for their activities, it is not keeping separate the church and the state.

A well-reasoned and well-documented dissent by Justice Reed illustrates that so long as religion and government exist side by side, interactions are inevitable, and he clearly develops his proposition that there cannot be utter, complete, and total separation of church and state. And yet, despite difficult marginal cases, the decisions over many years have established two lines of analysis which dispose of the hard cases as well as

[107] Ibid., at 1368.

[108] Everson v. Board of Education, 330 U.S. 1 (1947).

[109] 1946 Term Article, at 29.

[110] Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203 (1948).

[111] Everson v. Board of Education, 330 U.S. 1 (1947).

logic and analysis ever can. First, general social legislation, ranging from routine police and fire protection to welfare measures such as free textbooks or free transportation, may be extended to all citizens and is not to be denied to some because they or their children are of particular faiths or receive religious education.[112] General facilities of the state, such as streets or parks, may be made available for the dissemination of all religious doctrines to those who care to receive them.[113] But general welfare legislation is in its own class, and there cannot be direct or substantial subsidization of any or all denominations with tax funds. There is apparently a historical exception for tax exemptions.

Second, the coercive power of the state may not be used to compel or encourage participation in religious activities. The Champaign system was velvet-glove coercion, but it was coercion all the same. Presumably the only reason the denominations requested that the system be instituted was because they could not so handily procure participation in their programs without state aid. The Champaign case holds simply that the truant officer cannot be substituted for the spirit of the Lord as an inducement to attend religious classes.

As Justice Reed points out, Congress and the military forces have chaplains, and this is a form of state aid to religion. But no one is compelled to be a Congressman, and in the military forces there is no provision for a truant officer to enforce attendance at religious services.

It remains to count noses. However, in arriving at any sound judgment about the Court or its individual members, it must be remembered that the significance of counting positions in disputed civil rights cases is obscured by a number of factors. In the first place, the simple classification of "in support" or "in denial" of a claimed civil right overlooks the fact that the Justices reaching one result in a given case may themselves be far apart.[114] In the second place, procedure may at times outweigh substance as the controlling factor in the minds of particular justices, and cases decided on prodedural points are included in the tabulation.

Still more important as a distortion factor is the circumstance that the

[112] As in the Everson case or Cochran v. Louisiana State Board, 281 U.S. 370 (1930).

[113] And, indeed, if available to any, these facilities must be available equally to all without discrimination. The most recent case in this long line is Saia v. New York, 68 S. Ct. 1148 (1948), holding that police officers may not have unlimited discretion in granting licenses for the use of loud speaking equipment. While the Saia result follows inevitably from the cases cited, it is devoutly to be hoped by those who have suffered from the dreadful racket of such contrivances that municipalities may do equal justice if they care to by outlawing sound trucks altogether.

[114] As the discussion of the Oyama case, text at note 95 supra, and United States v. CIO, text at note 103 supra, show.

Court as a whole is probably more generous to civil rights than a perfect cross-section of American opinion would be. Justices Reed, Jackson and Burton, and Chief Justice Vinson, the civil liberties laggards on the Court, are far indeed from being Rankins or Gerald Smiths.[115] The statistics permit a judgment relative only to the other members of the Court.

But with all these limitations the fact remains that a heavy preponderance of a given Justice's positions in one column, when the number of cases is sizable, gives a clue as to his basic attitudes about civil rights. There were twenty-seven non-unanimous civil rights cases at the recent term,[116] and the positions of the Justices, compared with their 1946 positions, appear in Table 1.

TABLE 1

DISTRIBUTION OF VOTES IN NON-UNANIMOUS CIVIL RIGHTS CASES

Justice	In Support of the Claimed Right			In Denial of the Claimed Right		
	1946	1947	Total	1946	1947	Total
Vinson	0	6	6	12	21	33
Black	8	19	27	4	7	11
Reed	2	4	6	10	23	33
Frankfurter	2	12	14	10	15	25
Douglas	8	23	31	4	4	8
Murphy	10	25	35	1	2	3
Jackson	2	7	9	9	20	29
Rutledge	11	26	37	1	1	2
Burton	3	6	9	9	21	30

These figures document the obvious fact that in disputed cases involving civil rights there are identifiable blocs. They also show that those blocs are sufficiently fluid to make it worth while to argue a given case.

[115] To pick but one example, the Chief Justice wrote the restrictive covenant opinions in which Justice Burton joined.

[116] The twenty-seven divided civil rights cases are: Ahrens v. Clark, 68 S. Ct. 1443 (1948); Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28 (1948); Bute v. Illinois, 333 U.S. 640 (1948); Cox v. United States, 332 U.S. 442 (1947); Fisher v. Hurst, 333 U.S. 147 (1948); Gryger v. Burke, 332 U.S. 854 (1948); Haley v. Ohio, 332 U.S. 596 (1948); Hedgebeth v. North Carolina, 68 S. Ct. 1185 (1948); Johnson v. United States, 333 U.S. 10 (1948); Musser v. Utah, 333 U.S. 95 (1948); Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203 (1948); Ludecke v. Watkins, 68 S. Ct. 1429 (1948); Moore v. New York, 333 U.S. 565 (1948); In re Oliver, 333 U.S. 257 (1948); Oyama v. California, 332 U.S. 633 (1948); Parker v. Illinois, 333 U.S. 571 (1948); Paterno v. Lyons, 68 S. Ct. 1044 (1948); Price v. Johnston, 68 S. Ct. 1049 (1948); Saia v. New York, 68 S. Ct. 1148 (1948); Shapiro v. New York, 68 S. Ct. 1375 (1948); Takahashi v. Game Comm'n, 68 S. Ct. 1138 (1948); Taylor v. Alabama, 68 S. Ct. 1415 (1948); Townsend v. Burke, 332 U.S. 854 (1948); Trupiano v. United States, 332 U.S. 841 (1947); United States v. Di Re, 332 U.S. 581 (1948); Von Moltke v. Gillies, 332 U.S. 708 (1948); Wade v. Mayo, 68 S. Ct. 1270 (1948).

IV. LAWYERS' LAW

Now, Never, or Later?

At the October 1947 term the Supreme Court avoided deciding a sufficiently large number of cases which seemed ripe for decision to justify a review of the devices for avoidance.

Cases come to the Supreme Court by two principal means, certiorari and appeal. Certiorari is totally discretionary, and appeal is theoretically of right.[117] The certiorari jurisdiction is being used extremely sparingly, and a recent device may cut down the statutory right of appeal.

Certiorari, says the Court rule, is granted either because the question presented is important or because there is a conflict of decisions; and a denial of certiorari is said not to indicate approval of the decision below.[118] The rule is not wholly candid. Attorneys regularly include in their briefs in opposition to certiorari a section arguing that the decision below was correct, and that therefore the Court may as well leave it alone; and no one can look at the cases granted and denied review without concluding that the merits had something to do with the choice. This doubtless accounts for the fact that a preponderant number of certiorari cases are reversed.[119] In one case this year, the Court observed with unusual frankness, "The case is here on a petition for certiorari which we granted because the construction given to the federal Act seemed to us not only a dubious one *but also* at variance with . . . " another state decision.[120]

The Supreme Court in recent years has been hearing fewer cases than formerly. The percentage of writs of certiorari denied remains very high. In an address given last year, Justice Burton observed, "Without further explanation, such a high percentage might suggest a possible abuse of its own discretion, by the Court, in unduly restricting access to it." This, the Justice claimed, is avoided by the fact that only four Justices, instead of five, are sufficient to grant certiorari.[121]

Perhaps. But in 1947 the Court heard the smallest number of cases in years[122] and frequently denied certiorari in cases which, at least superficially, appeared to be worthy of the Court's attention.[123]

[117] Robertson and Kirkham, The Jurisdiction of the Supreme Court of the United States, is the most elaborate work in this subject.

[118] Rule 38(5), 16 U.S. Sup. Ct. Dig. 33 (1945).

[119] This year, for example, the ten Federal Circuit Courts of Appeals and the Court of Appeals for the District of Columbia were affirmed twenty-three times and reversed thirty-nine times. Review of the Supreme Court's Work, 16 U.S.L. Week 3383, 3384 (1948).

[120] LeMaistre v. Leffers, 333 U.S. 1, 3 (1948) (italics added).

[121] Burton, Judging Is Also Administration, 21 Temple L. Q. 77, 84 (1947).

[122] There were 119 opinions this year as compared with 142 at the 1946 term, 136 at the 1945 term, and 162 at the 1944 term.

[123] This view is expressed timidly, because every year there are sure to be marginal cases in which reasonable men can differ as to whether certiorari should be granted. Of the list that

The situation is now such that sincere and able lower court judges, anxious to be affirmed if they are right and reversed if they are wrong, go to extremes in writing their own opinions so as to be reviewed, and this writer has more than once heard Court of Appeals judges say wistfully, "I wrote it so as to put it squarely up to them." This practice received mocking rejoinder from Justice Jackson in one case this year when he observed of certain phraseology in an opinion below that it was perhaps a "decoy intended to attract our attention to the problem."[124] Getting a case reviewed by the Supreme Court should not involve the hazards of a duck hunt, and decoys ought not to be necessary.

But Congress gave the Supreme Court discretionary jurisdiction as to certiorari. It did not do so as to appealed cases, and judicial power is abused when those are not decided. At the October 1946 term the Court began the practice of dismissing appeals when it was dissatisfied with the shape of the record or with the extent of the consideration of the issues below.[125] That practice as applied to the *Denver Milk* case[126] at the current term deserves a glance.

The suit was brought in a Colorado court to enjoin a milk drivers' union from engaging in peaceful picketing. A series of such milk cases arose together in Colorado, and in one or another of them there was complaint, temporary restraining order, and a full trial at which evidence was introduced by both sides. On appeal, the Colorado Supreme Court, in a sixteen-page majority opinion and a dissent, analyzed the facts and applied the Colorado Labor Peace Act to the situation. The adequacy of the facts was specifically noted by that Court.[127]

The United States Supreme Court noted probable jurisdiction of the ap-

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follows, there may be good reason why some, even under the declared rule, should not have been granted, but they may at least be listed as dubious denials: No. 146, Schulte v. Park & Tilford (insider stock purchases); No. 162, Wilcox v. DeWitt (exclusion of "subversive" from West Coast); No. 277, Bernstein v. Van Heyghen Frères (effect of Nazi property confiscation); No. 342–343, United States v. Swiss Confederation (right of foreign government to sue United States for property taken by eminent domain); No. 484, Sellers v. Johnson (exclusion of religious sect from town by sheriff on ground of fear of riot); No. 534, Kennedy v. Tennessee, and No. 553 Misc., Hall v. United States (exclusion of Negroes from jury by use of prosecutor's challenges for that purpose); No. 535, Josephson v. United States, and No. 766, Barsky v. United States (contempt of Congressional Committees); No. 592, Kentucky v. Illinois Central R.R. (constitutionality of statute requiring that employees be given time off with pay to vote); No. 663, United States v. Cold Metal Proc. Co. (alleged fraud in obtaining patent).

[124] Maggio v. Zeitz, 333 U.S. 56, 59 (1948).

[125] Rescue Army v. Municipal Court, 331 U.S. 549 (1947).

[126] International Brotherhood of Teamsters v. Denver Milk Producers, Inc., 68 S. Ct. 1015 (1948).

[127] Denver Milk Producers, Inc. v. International Brotherhood of Teamsters, 116 Colo. 389, 183 P. 2d 529, 540 (1947).

peal on November 10, 1947. The case was argued on January 9, 1948. On May 3 the following order was entered: "Because of the inadequacy of the record, we decline to decide the Constitutional issues involved. The appeal is dismissed, without prejudice to the determination in further proceedings of any questions arising under the federal Constitution."[128] Justices Black and Murphy dissented.

And thus the injunction stands because the Supreme Court "declined to decide." When it takes six months to discover that a record is inadequate, one may suspect that the complexity of the issues as well as the obscurity of the facts had something to do with the matter. But, as the Court showed in cases arising on certiorari, when further illumination is needed the case can be sent back to obtain it.[129] Dismissing an appeal ends a case completely, without deciding it, and Congress has given the Court no such authority over appeals. In such an instance the practice of remanding for further proceedings below seems preferable to dismissal.

In addition to the avoidance devices of denying certiorari, dismissing appeals, and remanding cases, there are the devices of close definition of the cases which are ready for hearing either by the Supreme Court or by lower federal courts. In the *Republic Natural Gas* case[130] a majority of five held that a decision of the Oklahoma Supreme Court was not a "final judgment" and hence was not subject to Supreme Court review. In that case Republic had been ordered by the Oklahoma Corporation Commission to buy or market the gas of another concern in the same field or to close down, and the Oklahoma Supreme Court had approved. Presumably Republic would either buy or market the gas. Justice Frankfurter for the Court held that, although "[i]t is of course not our province to discourage appeals," the fact that the price Republic must pay had not been determined kept the decision of the Oklahoma Supreme Court from being final and reviewable.

Justice Rutledge, dissenting with Justices Black, Murphy, and Burton, declared that so to decide "is to make a fetish of technical finality." It made the final judgment provision of the Code, he said, "an instrument of sheer delay. . . ."[131] The dissenters thereupon proceeded to consider the issues of the case on the merits and concluded that the decision below should be affirmed. Justice Douglas split the difference by becoming the

[128] International Brotherhood of Teamsters v. Denver Milk Producers, Inc., 68 S. Ct. 1015 (1948).

[129] Kennedy v. Silas Mason Co., 334 U.S. 249 (1948); Loftus v. Illinois, 68 S. Ct. 1212 (1948).

[130] Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62 (1948).

[131] Ibid., at 87.

fifth member of the majority on the final judgment point, while making clear in a concurring opinion that he thought the four dissenters were correct on the merits.

The most extreme avoidance case was *Eccles v. Peoples Bank*.[132] This was an action for a declaratory judgment brought by the bank against the chairman of the Federal Reserve Board. It sought a declaration of invalidity with regard to a provision in the charter of the bank permitting the Board to eliminate the bank from the Federal Reserve system if Transamerica Corporation took a stock interest in the bank. Justice Frankfurter held for the Court that as a matter of equitable discretion the federal courts should not consider the question, since the Board had not yet indicated affirmatively that it intended to use the power it had to oust the bank.

Justices Reed and Burton were persuasive in dissent. Since the Board refused to indicate whether or not it would enforce the restriction, it held a constant threat over the bank, preventing the latter from carrying on activities which might, if the merits were reached, be held perfectly legal. The bank, which needs its Federal Reserve standing, must accede to what may be an illegal restraint on the marketability of its stock, and the Board can thus enforce the requirement without its ever being tested in court.

This is not to say that the Court invariably struggled to avoid decision. A leading example to the contrary is the *Connecticut Mutual* case,[133] which upheld a New York statute requiring payment to the state of certain uncollected benefits on life insurance policies. The statute covered foreign insurance companies and reached all policies on persons in New York at the time the policy was written. Nine foreign insurance companies brought an action in the New York state courts for a declaratory judgment that the Act was invalid, but the New York courts upheld the Act generally on all policies delivered in New York.

The statute raised the question of the relative merits of the claims of different states to the revenue available from uncollected insurance policies. For example, the state of incorporation of the company might have as much of an interest as the state in which the policy was issued. The situation would be further complicated if the beneficiary's last known residence was in a different state from that of the deceased, or if the deceased had moved after the issuance of the policy. Hence the Court divided over whether it could consider this variety of situations in a declaratory judgment proceeding between these parties.

[132] 333 U.S. 426 (1948).

[133] Connecticut Mutual Life Ins. Co. v. Moore, 333 U.S. 541 (1948).

But Justice Reed, writing for the majority, did not allow the complications to divert him from the routine case. Doubtless there will be a normal case, a case in which the deceased took out the policy in New York and died in New York, and where the beneficiary was a resident of New York at the maturity of the policy. Justice Reed declared that in such a case the interest of New York outweighed the interest of the state of incorporation and added, "We do not pass upon the validity in instances where insured persons, after delivery, cease to be residents of New York or where the beneficiary is not a resident of New York at maturity of the policy."[134] Thus, the Court broke the case apart and decided as much as it reasonably could. While the Reed opinion may be hard to justify in the logic of jurisdiction, it has strong appeal to common sense.

LEGISLATION

Although Justice Jackson made an interesting proposal to the American Law Institute that courts ought to stop trying to discover what Congress "meant" by legislation, aside from the terms of the statute,[135] the Court as a whole proceeded along its chosen path of interpreting statutes as best it could in terms of all available indications of congressional intention. Generally speaking, the device of interpretation by aid of canons of construction is incompatible with that objective, since the canons are artificial straitjackets quite unconnected with congressional will except by accident, and construction by canon received little support this year. The rule that statutes should be interpreted to avoid consideration of constitutional issues was specifically repudiated for a moment, though later reinstated,[136] and "strict construction of criminal statutes" was overridden.[137]

[134] Ibid., at 549. On the general subject of "now, never, or later," few of the Justices can be identified with particular attitudes. Justice Frankfurter most consistently and articulately expresses the view that the Court should avoid escapable decisions, particularly in the constitutional area. See, for example, his special opinions in the Gypsum and CIO cases.

[135] Jackson, The Meaning of Statutes: What Congress Says or What the Court Says, 34 A.B.A.J. 535 (1948).

[136] The canon that statutes should be so interpreted as to avoid raising constitutional questions is quite different from the rule that statutes should not be so interpreted as to make them unconstitutional. This rule, that statutes should not be construed so as to require the Courts to look at the Constitution, results in gross distortions of statutes, as in United States v. Delaware & Hudson Co., 213 U.S. 366 (1909); and see cases collected in Canon of Restrictive Interpretation Repudiated, 23 Ind. L. J. 323 (1948). United States v. Sullivan, 332 U.S. 689 (1948), was a reversal of a Circuit Court of Appeals decision. The Supreme Court said, "A restrictive interpretation should not be given a statute merely because . . . giving effect to the express language employed by Congress might require a court to face a constitutional question." The passage appeared to be a repudiation of the canon. However, without distinguishing this passage, a majority of five in the CIO case used the canon as the principal path to their result.

[137] United States v. Brown, 333 U.S. 18 (1948).

Of course the recognized difficulty in interpreting statutes with the aid of congressional intent is that in countless cases there is no ascertainable intent. The Court dealt with that problem in various ways.

a) How Much Freedom for Judges?

Where words are not clear and legislative history reveals only that Congress never thought about the subject at hand, the question becomes one of how freely the judges may look over the alternative constructions and choose the one they happen to like best. Perhaps the most candid statement applying this judicial free will was Justice Frankfurter's. In a special concurring opinion, the Justice said of a jurisdictional statute that it was desirable as a matter of sound policy to interpret it in a certain fashion and, "Since it can be so read, I do so read it. . . ."[138]

The *Uebersee* and *Evans* cases may be compared as illustrating the outer limits to which the Court will go in giving sense to badly drafted legislation.

In *Uebersee* the Court dealt with what it described, and charitably at that, as "hasty legislation which Congress did not stop to perfect as an integrated whole."[139] Uebersee was a Swiss corporation holding shares in various American corporations, and those interests were vested by the Alien Property Custodian under the Trading with the Enemy Act of 1917, amended in 1941. Under the 1917 Act, and prior to the 1941 amendments, Uebersee could have recovered the property vested since, as a corporation of a friendly alien, it was neither "enemy nor ally of enemy." Recovery would have been under Section 9(a) of the Act.

In view of the German practice of infiltrating American industry by means of German-dominated neutral holding companies, Section 5(b) of the Act was amended in 1941 broadly enough to permit the vesting of Swiss corporate interests. But Congress neglected to amend Section 9(a), so that, were the statute interpreted in its terms, the property would be vested under 5(b) and immediately be returned under 9(a). The Court, confronted with "difficulties whichever way we turn," cut through them by doing what Congress had not thought to do and modified the definition of "enemy or ally of enemy" to include holding companies with an enemy taint. That solution both permits innocent foreign corporations to have a judicial remedy and preserves the policy of the 1941 amendment.

This amounts to rewriting of poor legislation. In the *Evans* case the Court was asked to do the same thing. The case involved a statute which made it unlawful 1) to bring aliens into the country unlawfully or 2) to

[138] United States v. United States District Court, 68 S. Ct. 1035, 1038 (1948).

[139] Clark v. Uebersee Finanz-Korp., 332 U.S. 480, 488 (1947).

harbor aliens brought in unlawfully. By some error the penalty applied only to the former activity, and there was none specified as to the latter. The Court declined to supply one, saying that "we can only guess with too large a degree of uncertainty, which one of the several possible constructions Congress thought to apply. . . . This is a task outside the bounds of judicial interpretation."[140]

The point, somewhere between *Uebersee* and *Evans*, at which a statute becomes too chaotic to be interpreted cannot, of course, be identified by any generalization. Such statutes as that in the *Evans* case merge finally into those acts which are too indefinite to be applied at all.

b) Indefiniteness

The doctrine that a statute may be void for indefiniteness is of American origin and came into existence as an aspect of substantive due process of law.[141] While there were random references to indefiniteness prior to the Fourteenth Amendment, the conception received its largest impetus from Justice Brewer, who was also a prime architect of judicial review of rates and of social legislation generally.[142] The rules concerning definiteness were invoked largely for the purpose of challenging regulatory legislation, particularly that dealing with monopolies and trusts in the 19th Century.

According to the modern statement of the rule, "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essentials of due process of law."[143] The trouble with this as a rule is that in most cases worth litigating there is the sort of difference as to statutory application which the rule would appear to cover. The principal of definiteness thus gains its sole meaning from the consideration of the concrete cases in which it has been applied.

If there is a unifying strain in the Supreme Court cases, it is this: A legislature may use very general language when in the nature of the problem it has no practical alternative or when as a matter of deliberate social policy it determines that there is a preponderate merit in doing so. But a legislature may not use such loose and indefinite language where no im-

[140] United States v. Evans, 333 U.S. 483, 495 (1948).

[141] For an excellent recent study of indefiniteness, see Void for Vagueness: An Escape from Statutory Interpretation, 23 Ind. L. J. 272 (1948).

[142] The device is unknown in England and was mentioned in federal courts only twice before the Fourteenth Amendment. The Enterprise, 8 Fed. Cas. 732, No. 4,499 (C.C. N.Y., 1810); United States v. Sharp, 27 Fed. Cas. 1041, No. 16,264 (C.C. Pa., 1815). For early state cases see the Note, supra, n. 141. The real life of the rule began with Justice Brewer's dicta in Chicago & N.W. Ry. Co. v. Dey, 35 Fed. 866, 876 (C.C. Iowa, 1888).

[143] Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

perative reason exists and particularly when more explicitness would be readily possible. It would be hard to find a better way to deal with the problem than to say that hotel-keepers should "do all in their power" to save guests in case of fire;[144] or that business expenses must be "reasonable" for tax purposes;[145] or that the penalty for kidnaping shall be affected by whether the victim is "liberated unharmed."[146] And Congress made a careful judgment when it used "restraint of trade" in the Sherman Act.[147] All have been held valid.

On the other hand, it would have been easy to have been more precise and to give the citizen more adequate notice of his duties than in those statutes, held invalid, which required a contractor to figure out the "prevailing wage" in an area;[148] or forbade a grocer to "exact excessive prices";[149] or ordered that streetcars be operated "without crowding."[150]

Sound application of the principle of practicality is demonstrated by the leading indefiniteness case at the 1947 term. In *Winters v. New York*[151] the Court invalidated a New York statute which, as interpreted by the New York courts, forbade booksellers to sell accounts of crime and violence "so massed as to incite to crime." The modern object of such statutes is the salutary one of keeping out of the hands of children low-grade publications which will incite to juvenile delinquency.

The trouble with the statute is that whether any given publication is of the offending type depends on highly variable reader responses which the bookseller has no conceivable way of predetermining.[152] Many a youngster can doubtless purchase a series of stories behind a cover depicting a dagger plunged into a beautiful lady without being induced to find a dagger—and a beautiful lady—and repeat the act. The mere transfer of a dime from the youngster to the bookseller is not the sort of transaction which permits the seller to decide whether the purchaser will be inspired to evil deeds by his

[144] Miller v. Strahl, 239 U.S. 426 (1915).

[145] United States v. Ragen, 314 U.S. 513 (1942).

[146] Robinson v. United States, 324 U.S. 282 (1945).

[147] Nash v. United States, 229 U.S. 373 (1913).

[148] Connally v. General Construction Co., 269 U.S. 385 (1926).

[149] United States v. Cohen Grocery Co., 255 U.S. 81 (1921).

[150] United States v. Capital Traction Co., 34 App. D.C. 591 (1910).

[151] 333 U.S. 507 (1948).

[152] The bookseller's task is rendered particularly difficult because while crime accounts, and particularly those of sadistic and masochistic nature, appeal to anti-social perversion, there is no scientific evidence that they incite "normal" youngsters to crime. "If even a small percentage of those who saw stories of crime in the movies or of those who read 'pulp magazine' accounts of criminals were delinquents, the statistics for juvenile delinquency would be a hundredfold what they are." Healy and Bronner, New Light on Delinquency 135 (1936).

purchase. Too much depends upon the response of the reader, too little on the book. The Bible, for example, has probably incited more murders than any other printed work.

Under such circumstances it seems reasonable to require New York and other states with similar statutes to devise some more precise way of dealing with the problem. So Justice Reed held for the Court, with Justices Frankfurter, Jackson, and Burton dissenting. If a more precise statute cannot be drafted, then an administrative agency to make ad hoc determinations about particular publications will be necessary and presumably appropriate as far as the objection of indefiniteness is concerned.

The frequency with which the objection of indefiniteness has been arising of late makes the topic worthy of the closest attention. Because most statutes involve general terms, there is great possibility here for the restoration of a judicial veto of disliked legislation, after the fashion of the old due process, this time on the ground that the statute in question is vague. Yet it should be noted that no statute which fulfilled the general rule of practicality described above has been invalidated in recent years.

c) Congressional Re-enactments

Were there a contest to select the most completely chaotic corner of the law, the one containing the principles for determining the effect of congressional re-enactment of a statute after judicial interpretation would be a fair candidate. Congress acts, the Court decides, Congress re-enacts, and later the Court is pressed to re-examine the earlier decision. May it do so?

The Court at the 1947 term added more literature than light to this subject, and the cases can only be listed without drawing any clear conclusions. In a tax case, where the interpretive decisions were by lower courts, there was no difficulty in thrusting them aside: "[T]he doctrine of legislative acquiescence is at best only an auxiliary tool for use in interpreting ambiguous statutory provisions. . . . We do not expect Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation."[153]

But what if the error is enthroned on high? In *Francis v. Southern Pacific Co.*, Supreme Court decisions interpreting a provision of the Hepburn Act were held to have been re-enacted by the Transportation Act of 1940.[154] The majority opinion cited nothing to show that Congress actually intended by its re-enactment to adopt the judicial interpretations, and

[153] Jones v. Liberty Glass Co., 332 U.S. 524, 533–34 (1947).

[154] 333 U.S. 445 (1948). The earlier Act had been interpreted as depriving railroad employees of all claims for negligence against the railroad if they had been riding on free passes.

Justice Black suggested in dissent that it was merely a "convenient fiction" to suppose that Congress even knew of the older interpretations.

A far more serious example of the practice of construing re-enactments as approval of decisions occurred in *United States v. South Buffalo Railway Co.*[155] In 1936 the Supreme Court held in the *Elgin* case[156] that while the commodities clause of the Interstate Commerce Act forbade railroads to haul goods for use in activities of its own unrelated to railroading, the railroad might undertake such hauling for the use of an affiliated corporation. Justices Brandeis, Stone, and Cardozo dissented, doubting that Congress had intended its policy to be thus gutted by use of holding companies.

In the *South Buffalo Railway* case five members of the Supreme Court held that Congress, by adoption of the Transportation Act of 1940, meant to retain the *Elgin* decision. Justice Rutledge, joined in his dissent by Justices Black, Douglas, and Murphy, began, "This is another case where the Court saddles Congress with the load of correcting its own emasculation of a statute, by drawing from Congress' failure explicitly to overrule it, the unjustified inference that Congress approves the mistake."[157]

While the dissent seems sounder than the majority in its analysis of the actual intent of Congress in the 1940 Act, both majority and minority demonstrate the proper method for determining the effect of a subsequent statute. Both attempt to discover what Congress actually meant to do by its subsequent legislation. When Congress did not deal with the subject consciously, there is no reason to draw any conclusion from the second statute.

CONFLICT OF LAWS

Among the most satisfying accomplishments of the Court at the 1947 term is clarification of the divorce muddle. As Justice Jackson put it, "If there is one thing that the people are entitled to expect from their lawmakers, it is rules of law that will enable individuals to tell whether they are married, and, if so, to whom."[158] Justices Burton and Vinson had been added to the Court since *Williams I* and *II*, and the Court's position on foreign divorce problems was left in doubt until the new Justices declared themselves. Since the details will doubtless be discussed in every law review, only the basic principles need be stated:

1. Divorce decrees based on domicile of one party and constructive

[155] 68 S. Ct. 868 (1948).

[156] United States v. Elgin, J. & E. Ry. Co., 298 U.S. 492 (1936).

[157] United States v. South Buffalo Ry. Co., 68 S. Ct. 868, 875 (1948).

[158] Estin v. Estin, 68 S. Ct. 1213, 1220 (1948).

service on the other are entitled to full faith and credit in other states;[159] *except* that:

2. Other states may in appropriate proceedings ignore such divorces if they find that the claimed residence of the moving party in obtaining the divorce was a fraud upon the court which granted it.[160] In short, Florida and Nevada divorces based on constructive service are no better than other states are willing to consider them.

3. If, however, both parties leave the state of origin, go to the divorcing state, participate in the proceedings, and have full opportunity to challenge residence, and if they are accorded full procedural due process there, neither party can subsequently attack the validity of the divorce in another state.[161] If, then, a lawyer wants a client to obtain a Nevada or Florida divorce which cannot be challenged by his client's spouse, he ought to send both parties.

The first and second of the above propositions, established by the *Williams* cases, remain firm on the basis of their respectful recitation in this year's divorce cases. The third was established by this year's cases.

A less frequent problem was treated with equal clarity in the term's other divorce cases: If state A gives a separation decree to a couple in residence, ordering alimony, and state B subsequently gives a total divorce to one of the parties with constructive service on the other, the alimony portion of the separation order still stands.[162] A husband may not duck out of his support money debt by running to Nevada, because the Nevada court has no jurisdiction over his creditor wife.

To approve the decisions, one must indeed believe that certainty is the special element of value in the law of full faith and credit in divorce. Justice Frankfurter, dissenting in these cases, argues with great force and eloquence that these decisions subordinate the policy of 43 states, which do not allow quickie divorces, to the five which do. But this is not so. The rule for which the Justice contends permits every state to re-examine the divorces of every other state; for example, his principal reliance, *Andrews v. Andrews*, involved states different from the five which he says have the most lax residence laws.

The problem thus passes to Congress. If the overwhelming majority of

[159] Williams v. North Carolina, 317 U.S. 287 (1942).

[160] Williams v. North Carolina, 325 U.S. 226 (1945).

[161] Coe v. Coe, 68 S. Ct. 1094 (1948); Sherrer v. Sherrer, 68 S. Ct. 1087 (1948). "Insofar as [Andrews v. Andrews, 188 U.S. 14 (1903)] may be said to be inconsistent with judgment herein announced, it must be regarded as having been superseded by subsequent decisions of this Court." Ibid., at 1092.

[162] Estin v. Estin, 68 S. Ct. 1213 (1948).

the states object to husbands and wives both going to Nevada for divorces, Congress presumably has power under the Full Faith and Credit Clause to make the necessary regulations.

V. THE INSTITUTION AND ITS JUSTICES

THE WORK OF THE INSTITUTION

The Court handed down 119 opinions this year, probably the smallest number since the Civil War. One of the reasons for this shrinkage of the docket, which has been discussed above, is the narrowly confined grant of the privilege of certiorari. But there are a number of other causes as well. One is the fact that since *Erie v. Tompkins* the common law questions arising in diversity have substantially disappeared from the docket. A second is the decline of substantive due process of law in the economic field and the expansion of federal power under the Commerce Clause, so that it is no longer purposeful to litigate questions which ten years ago came to the Court. For these and perhaps other reasons, there were far fewer petitions for certiorari than usual.

As a result of these three factors, the Court's docket would be far smaller than it is had not the civil liberties cases so expanded in number. Frankfurter and Landis, *The Business of the Supreme Court*, chronicled the shift in the nature of the Court's business from the 19th to the 20th Century, a shift from a private law to a public law docket. We are in the midst of another shift almost as radical in its nature, this time carrying a substantial portion of the business of the Court to the civil rights sector of the public law.

Since the docket was smaller, the fact that considerable variation exists in the number of majority opinions written by individual Justices was slightly less striking than last year.[163] As usual, the largest number of opinions was written by Justices Black and Douglas, but Justice Murphy's ill health caused him to slip for the moment out of his usual third position, which he yielded to Justice Jackson.

The most apparent differences between the 1946 and 1947 terms were

[163] The table of opinions is as follows:

Justice	Majority	Concurrence	Dissent	Separate	Total
Vinson	12	.....	1	.....	13
Black	18	1	3	1	23
Reed	11	2	5	.....	18
Frankfurter	7	12	18	3	40
Douglas	22	3	7	.....	32
Murphy	9	2	6	.....	17
Jackson	17	1	13	.....	31
Rutledge	10	8	10	.....	28
Burton	4	.....	7	.....	11

the declining influence of Justices Frankfurter and Jackson in determining the results of important cases and the corresponding increase in weight of Justices Black and Douglas and, even more markedly, Justices Murphy and Rutledge. The influence of particular Justices can be measured only by concentrating on the most important decisions. For this purpose I have, obviously arbitrarily, picked two groups of cases. The first are the nine cases which seem the most significant of the year. The second group, twenty-four in number this year, are the cases which, though less important, are far from routine. The remaining cases were put aside either because they are less important or because the decision made was the fairly

TABLE 2
VOTING DISTRIBUTION

Justice	Majority Votes			Dissenting Votes		
	Major	Important	Total	Major	Important	Total
Vinson	8	18	26	1	6	7
Black	7	18	25	2	6	8
Reed	5	17	22	3	7	10
Frankfurter	8	11	19	1	13	14
Douglas	7	17	24	1	6	7
Murphy	8	17	25	1	7	8
Jackson	4	13	17	1	10	11
Rutledge	7	19	26	1	5	6
Burton	6	14	20	3	10	13

obvious one, even though a contrary decision would have made the case of great interest.[164]

The data in Table 2 are taken from the nine "major" cases and the

[164] The nine cases chosen as "major" are: FTC v. Cement Institute, 333 U.S. 683 (1948); Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203 (1948); Oyama v. California, 332 U.S. 633 (1948); Shelley v. Kraemer, 334 U.S. 1 (1948); Trupiano v. United States, 68 S. Ct. 1229 (1948); United States v. Columbia Steel Co., 68 S. Ct. 1107 (1948); United States v. CIO, 68 S. Ct. 1349 (1948); United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948); United States v. United States Gypsum Co., 333 U.S. 364 (1948). The twenty-four cases chosen as "important" are: Bay Ridge Operating Co. v. Aaron, 68 S. Ct. 1186 (1948); Bute v. Illinois, 333 U.S. 640 (1948); Central Greyhound Lines, Inc. v. Mealey, 68 S. Ct. 1260 (1948); Connecticut Mutual Life Ins. Co. v. Moore, 333 U.S. 541 (1948); FTC v. Morton Salt Co., 334 U.S. 37 (1948); Haley v. Ohio, 332 U.S. 596 (1948); International Salt Co. v. United States, 332 U.S. 392 (1947); Johnson v. United States, 333 U.S. 10 (1948); Maggio v. Zeitz, 333 U.S. 56 (1948); Ludecke v. Watkins, 68 S. Ct. 1429 (1948); In re Oliver, 333 U.S. 257 (1948); Price v. Johnston, 68 S. Ct. 1049 (1948); Saia v. New York, 68 S. Ct. 1148 (1948); Shapiro v. United States, 68 S. Ct. 1375 (1948); Sherrer v. Sherrer, 68 S. Ct. 1087 (1948); Takahashi v. Game Comm'n, 68 S. Ct. 1138 (1948); Toomer v. Witsell, 68 S. Ct. 1156 (1948); United States v. Line Material Co., 333 U.S. 287 (1948); United States v. South Buffalo Ry. Co., 68 S. Ct. 868 (1948); Von Moltke v. Gillies, 332 U.S. 708 (1948); Williams v. Fanning, 332 U.S. 490 (1947); Winters v. New York, 333 U.S. 507 (1948). Some theoretical obscurities in Lichter v. United States, 68 S. Ct. 1294 (1948), make it difficult to allocate it as "major" or "important," and it has been omitted from both lists.

twenty-four "important" cases. Disqualifications give some Justices less than the total of thirty-three.

The distribution of agreements among the Justices in these thirty-three cases, whether in majority or dissent, is shown in Table 3.

Last year's equivalent of Table 2 showed appreciable differences. At the 1946 term the controlling group consisted of Justices Reed, Burton, and Chief Justice Vinson. They were seldom in dissent. Next most influential at the 1946 term were Justices Frankfurter and Jackson, who were in agreement more often than any of the remaining Justices and were predominantly in the majority. At the 1946 term Justices Black, Douglas, Murphy, and Rutledge were very frequently on the losing side, Justice Rutledge being more often in dissent than in the majority in the significant cases.

TABLE 3

AGREEMENTS AMONG JUSTICES IN MAJOR AND IMPORTANT CASES

	Vinson	Black	Reed	Frankfurter	Douglas	Murphy	Jackson	Rutledge	Burton
Vinson	.....	22	25	16	17	18	15	19	25
Black	22	.....	18	11	28	29	9	28	16
Reed	25	18	.....	14	13	14	16	16	23
Frankfurter	16	11	14	.....	13	15	21	14	18
Douglas	17	28	13	13	.....	28	12	27	13
Murphy	18	29	14	15	28	.....	11	30	12
Jackson	15	9	16	21	12	11	.....	13	16
Rutledge	19	28	16	14	27	30	13	.....	13
Burton	25	16	23	18	13	12	16	13	.....

The 1947 term told a different story. Once again Justice Vinson was predominantly in the majority, but so was Justice Rutledge. Justices Black, Douglas, and Murphy ranked next. Justice Burton had become a leading dissenter along with Justices Frankfurter and Jackson, who were in dissent most often of all the Justices.

In short, at the 1947 term a little of the balance of power had shifted, giving the views of Justices Black, Douglas, Murphy, and Rutledge an effectiveness they had not had the year before. However, the number of cases is so small and the figures so close that it would be premature to call the trend substantial. Some of the difference may be accounted for by the slight shift in the nature of the cases which happened to come before the Court.

The pattern of agreements among Justices remained as before. Chief Justice Vinson and Justices Reed and Burton are predominantly in agreement with each other, as are Justices Black, Douglas, Murphy, and Rut-

ledge. Justices Frankfurter and Jackson continued to be in frequent accord.

The most substantial difference between the 1946 and 1947 terms comes to this: Justices Black, Douglas, Murphy, and Rutledge were in agreement substantially as often as before; but they were joined by one or two other Justices more often than in the preceding term.

THE WORK OF THE INDIVIDUAL JUSTICES

Chief Justice Vinson in his second term continued to administer his responsibilities with the same outward good temper as during his first. The only open display of ill-temper among the Justices during the term was a momentary brush during oral argument between the Chief Justice and Justice Frankfurter which, though widely recounted in the press, is surely but a trifle of strain in a nine-month term.[165] The Chief Justice's majority opinions and his only dissent to date were extremely temperate, and his serious responsibility of assigning opinions continues to be well handled.

The Chief Justice's technical workmanship, good enough the year before, appeared at least as good in his second term. In his second term, as in his first, he occasionally made his task simpler than it was by making exceedingly thin distinctions of apparently controlling precedents.[166] We may conclude that it is not the Chief Justice's conception of the judicial function that he should meet his intellectual difficulties head on when he can go around them. Certainly, however, he continues to have no fear of precedent, and in his most important opinions (the restrictive covenant cases, the divorce cases, and the Japanese farmer discrimination cases) he cheerfully made new law.[167]

The principal new dimension added to the picture of Vinson, C.J., in the 1947 term, was a friendship toward civil rights. The 1946 term had shown Vinson as markedly insensitive to claims of civil liberty. But so small a sampling gave a distorted picture. As discussion earlier in this article shows, Vinson remains far from the civil rights philosophy of a Holmes or a Hughes, but his conservatism is moderate. "Civil liberties" is of course a loose phrase, covering the entire Bill of Rights and perhaps more. On searches and seizures or right to counsel, Vinson is little moved by appeals to the Constitution; but on the leading race-prejudice cases of the year, he stood firm for freedom. One who would pigeon-hole the Chief Justice must define his values very sharply.

[165] The Louisville Courier Journal (Apr. 30, 1948) headline was: "Vinson Hushes Up Frankfurter in Unusual Supreme Court Flare-Up." For details see 16 U.S.L. Week 3329 (1948).

[166] The restrictive covenant cases, Oyama v. California, and Sherrer v. Sherrer are examples.

[167] Cases cited note 166 supra.

Justice Black continued to do somewhat more than his share of the work of the Court, and he had the satisfaction of seeing his views prevail more often than the year before. In a year presenting a large number of anti-trust and trade regulation cases, he was certain to be busy; for the core of Black's economic faith is a belief in the rigorous enforcement of the laws affecting competition. It is doubtful if Black has ever found a case before him in which he considered the anti-trust laws too vigorously applied to an industry. This year he wrote the opinions affirming the Federal Trade Commission in striking down the basing-point system in the cement industry and the quantity-discount system in the salt industry.[168]

As a stylist, Black continued to write concise, simple English. His *Cement* opinion, one of the longest he has ever written, is a remarkable digest of a case in which the record of testimony and exhibits contained almost 100,000 pages. Probably Black's least satisfactory opinion of the year from the standpoint of crisp organization was the *Francis* dissent,[169] which expressed his view that railroads were not free of liability for negligence to employees riding on free passes. Though the conclusion is strong, the beginning is discursive.

Black's views on civil rights have seldom been more clearly reaffirmed than in this term. He continued his pattern of broad construction of the government's power of search and seizure. Otherwise he hit hard at serious restrictions. His opinion in *Von Moltke v. Gillies*,[170] where a defendant charged with espionage had not been given proper counsel, illustrates Black's device of careful fact presentation and shows his experience as a jury lawyer. His majority opinion in the *Oliver* case,[171] invalidating a contempt order of a Michigan one-man grand jury, and his dissent in the *Ludecke* case,[172] involving deportation without judicial review, are among the most forceful and effective he has written.

The 1947 term was probably the most influential year Justice Reed has had since coming to the Court, and his central position on the Bench has long made him a figure of great influence. He wrote the opinion of the Court in the *Gypsum* and *Line Material* cases[173] which, as discussion above

[168] FTC v. Cement Institute, 333 U.S. 683 (1948); FTC v. Morton Salt Co., 334 U.S. 37 (1948).

[169] Francis v. Southern Pacific Co., 333 U.S. 445, 451 (1948).

[170] 332 U.S. 708 (1948). The majority opinion was followed and applied later in the year in Behrens v. Hironimus, 166 F. 2d 245 (C.C.A. 4th, 1948).

[171] In re Oliver, 333 U.S. 257 (1948).

[172] Ludecke v. Watkins, 68 S. Ct. 1429, 1436 (1948).

[173] United States v. United States Gypsum Co., 333 U.S. 364 (1948); United States v. Line Material Co., 333 U.S. 287 (1948).

has shown, reconsidered and narrowed the rights of patent holders under the anti-trust laws. The latter case shows particularly well the crucial position of Reed in the intellectual current of the Court. Black, Douglas, Murphy, and Rutledge would overrule the antecedent *General Electric* case; Vinson, Frankfurter, and Burton would leave it largely as it was; and Jackson did not participate. Thus Reed's unique compromise becomes the law, for he has the pleasure of the man in the middle in holding the balance of power. It is sometimes rumored that in five-to-four decisions the task of writing the majority opinion is frequently assigned to the Justice least enthusiastic for the result so as to hold him firm. In the light of this surmise, it may be noted that Reed wrote the opinion for five Justices in the *Columbia Steel* case, which permits United States Steel to inch ahead to further expansion.[174]

Reed's opinions were as usual fairly extensive and occasionally, as in *Andres v. United States*,[175] not quite clear. Each opinion deals conscientiously with the problem presented, seldom but occasionally skidding around an issue.[176]

In short, Reed continued in 1947 to defy successful generalization. Usually conservative in civil rights matters, he is reasonable and moderate. Because his views and his temperament lack the color of some of his brethren's, he receives far less attention from students of the Court than he warrants. Reed has now served for ten full terms, and someone would perform a service by making a detailed study of his work.

If Justices at the end of a term pause for a moment after clearing off the desk and try to decide whether the year has been good or bad, Justice Frankfurter must have had a moment of unhappy thought. The 1947 term, measured by any standard, must have been one of the least satisfactory he has known. The number of his majority opinions was very small, and he was in dissent more often than any other Justice in the significant cases of the year. He was in the majority in all nine "major" cases (which were largely unanimous) except for his partial dissent in

[174] United States v. Columbia Steel Co., 68 S. Ct. 1107 (1948). Speculation as to whether Reed "really meant it" was also engaged in on the Bench, when Justice Frankfurter's oral dissent to the Reed opinion in the Bay Ridge case said in substance that the audience could tell from the tone of Reed's voice as he gave the majority opinion that Reed had reached his result reluctantly.

[175] Andres v. United States, 333 U.S. 740 (1948).

[176] For example, in the Connecticut Mutual case, Justice Reed never explained the exact theory which permitted him to affirm a declaratory judgment granted by the New York courts and at the same time decline to express himself on some of the points which the New York court had decided.

Paramount;[177] but his views were in the minority when he upheld the contempt power of the one-man grand jury, when he objected to the comprehensive anti-trust decree in Jackson's *International Salt* case, when he contended that venue might be challenged for inconvenience in anti-trust suits, and when he asserted that city officials should be subject to no standard in granting licenses for speaking devices.[178] His most important majority decision was the holding that alleged Nazi aliens could be deported by order of the Attorney General without judicial review.[179]

Superficially at least, no standard appears to guide Justice Frankfurter's judgment as to when to write a special opinion. Obviously, no Justice can write in every case; and if he attempts to do so in an enormous number, his real work of writing opinions for the Court will suffer. In this term Justice Frankfurter had something to say in forty cases, 33% of the total. Hence he contributed only seven majority opinions. Sometimes the concurrence or special opinion was better than the opinion with which it was joined,[180] and sometimes the Justice wrote with the prodigious power of which he is capable.[181] But more often the special opinion seemed expression for its own sake, without anything really worth saying.[181a] Justice Frankfurter's range between good and bad work is the widest on the Court.[182]

The 1947 term for Justice Douglas, like each of its predecessor terms, was a year of tremendous hard work. Douglas wrote twenty-two majority opinions, more than any other Justice; and many of them, as, for example,

[177] United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948).

[178] In re Oliver, 333 U.S. 257 (1948); International Salt Co. v. United States, 332 U.S. 392 (1947); United States v. National City Lines, Inc., 68 S. Ct. 1169 (1948); Saia v. New York, 68 S. Ct. 1148 (1948), respectively.

[179] Ludecke v. Watkins, 68 S. Ct. 1429 (1948).

[180] United States v. Scophony Corp., 333 U.S. 795 (1948); Priebe & Sons v. United States, 332 U.S. 407 (1947).

[181] The dissent in Coe v. Coe and Sherrer v. Sherrer, 68 S. Ct. 1097 (1948), is a good example.

[181a] A great number of examples could be cited. To choose one, United States v. United States District Court, 68 S. Ct. 1035 (1948), presented a problem of interpretation of a minute point in the statute providing for transfer of anti-trust cases from the Supreme Court to a Circuit Court of Appeals when there is a lack of a quorum in the Supreme Court. It is extraordinarily unlikely that this problem will ever arise again, and Justice Frankfurter concedes it is "rare, if not unique." The question was decided for the Court in an opinion by Justice Douglas. Justice Frankfurter concurred specially to reach the same result by a slightly different path. While the Frankfurter way may be better, the utility of writing even a paragraph to describe it is dubious.

[182] Examples of good workmanship are cited in notes 180 and 181 supra. Consider, on the other hand, the dissent in International Salt Co. v. United States, 332 U.S. 392 (1947), which contains more clichés than three pages will carry ("burning even part of a house to roast a pig"; "bare bones of the pleadings"; "the baby is not to be thrown out with the bath"). And see the concurrence in Haley v. Ohio, 332 U.S. 596 (1948), a forced confession case, particularly important because the decision was five to four. The concurrence is highly autobiographical and is going to give the state supreme courts trying to applyi t a difficult time.

the *Paramount* decision,[183] dealt with matters of time-consuming difficulty.

Throughout the year, Douglas' name was coupled with political speculation over whether he might be a candidate for the presidency. But if siren voices may occasionally have tempted, they certainly never affected Douglas' work. From the standpoint of politics, it would have been well in 1948 for Douglas to trim a little, particularly in civil rights matters. But never did he hold more firmly to the lines he had previously laid out for himself, and particularly in race-discrimination cases he was firm for the full guarantees of due process and equal protection.

The least satisfactory Douglas opinion from a purely technical standpoint was *Ahrens v. Clark*,[184] holding that federal courts cannot hear habeas corpus actions when the prisoner is outside the territorial jurisdiction of the court. A sound line of authority, beginning with an opinion by Judge Cooley, had held that if the captor to whom the writ is directed was within the jurisdiction, the Court might proceed. Douglas himself had in another year quoted the Cooley passage with approval.[185] The new rule raises serious troubles for petitioners in the custody of the District of Columbia, which occasionally keeps its prisoners over the District border.[186] Furthermore, the fourth footnote in the *Ahrens* opinion specifically reserved a subsidiary question for future decision, and yet Justice Douglas cited with approval in the text a case which had decided the very point reserved.[187]

Douglas' writing style is usually more businesslike than emotional, but occasionally restraint gives way to eloquence. The *Columbia Steel* dissent, quoted above, is an example.[188] As examples of concise lucidity, two concurrences and a dissent demonstrate Douglas' best writing qualities. They are the *Bob-Lo* and *Line Material* concurrences and the *Bute* dissent.[189]

As indicated in this article last year, the 1946 term was a year of superb accomplishment for Justice Murphy, and one of the best he has had. Unhappily the Justice's ill health kept the 1947 term from being as successful. For nearly two months he was unable to hear argument, and his health

[183] 334 U.S. 131 (1948).

[184] 68 S. Ct. 1443 (1948).

[185] In the Matter of Jackson, 15 Mich. 417, 439–40 (1867), quoted with approval in Ex parte Mitsuye Endo, 323 U.S. 283, 306 (1944).

[186] Sanders v. Allen, 100 F. 2d 717 (App. D.C., 1938).

[187] McGowan v. Moody, 22 App. D.C. 148 (1903).

[188] 68 S. Ct. 1107, 1127 (1948).

[189] 333 U.S. 28, 40 (1948); 333 U.S. 287, 315 (1948); 333 U.S. 640, 677 (1948), respectively.

precluded his writing as many opinions as usual. He was completely recovered by term's end.

Nonetheless, the opinions Justice Murphy did write were of extremely high quality. Murphy's special genius is his capacity to write passionately about civil rights without becoming a sentimentalist. The number of odd or marginal civil rights cases which come before the Court, cases in which rights are claimed by obviously guilty criminals or by persons themselves intolerant, occasionally obscure the basic American values involved. Justice Murphy effectively invokes those values. Examples are his dissent in *Moore v. New York*,[190] condemning the "blue ribbon" jury as contrary to the Constitution's faith in the jury system in criminal cases, and his concurrence in the *Oyama* case,[191] which gives a thorough factual base to the repudiation of a relic of racism in California. His leading majority opinions of the year were in *Price v. Johnston*,[192] reviewing the nature of the writ of habeas corpus, and the *Trupiano* case,[193] which established a strong requirement for search warrants.

Justice Jackson wrote seventeen opinions, more than usual, and produced several of high quality. His disqualification in five of the term's major cases to some extent limited his effectiveness.

Jackson was criticized in this article last year for occasional bad taste in dissent or concurrence. Although that charge was repeated for this year's cases in a *St. Louis Post-Dispatch* editorial,[194] it cannot be made with the same propriety this year as last. Jackson is both blessed and cursed with a flashing style which makes his opinions read easily, and at the same time he falls too readily into personal aspersions. This year that style seemed, the *Post-Dispatch* to the contrary, in reasonably good control.

Jackson certainly has the ability to have his say and be done with it, and discursiveness is not a common fault with him. Examples of good, concise writing are his opinions in a minute matter, *Hunter v. Martin*,[195] and a more serious one, *International Salt Co. v. United States*.[196] His views on substantive questions, particularly but not exclusively in the civil rights area, remained conservative to the point of reaction. He dissented even in the two decisions invalidating discriminations against Japanese in Cali-

[190] 333 U.S. 565, 569 (1948).

[191] 332 U.S. 633, 650 (1948).

[192] Price v. Johnston, 68 S. Ct. 1049 (1948).

[193] 68 S. Ct. 1229 (1948).

[194] Undated editorial, "Supreme Court Discord," said after defending the right of dissent, "What is wrong is that Justice Jackson should be so unjudicious in his disagreement."

[195] Hunter v. Martin, 68 S. Ct. 1030 (1948).

[196] 332 U.S. 392 (1947).

fornia, and with only rare exceptions, such as his opinion in *Townsend v. Burke*,[197] continued to support limitations on the right to counsel.

As noted above, Justice Rutledge was in the majority far oftener than in the preceding term. He wrote ten majority opinions as well as some excellent dissents and concurrences.

As Rutledge's best opinions always reveal, he is prodigiously capable of handling great cases well. But his ability with great cases is a source of weakness with lesser matters, for it is difficult for Rutledge to make sufficiently light of those narrow issues better decided in a word. Two extensive opinions in venue cases this year make the point.[198]

But there were also larger issues which gave full scope to Rutledge's meticulous researches. The dissenting opinion in the *South Buffalo* case is an example of a solidly built Rutledge structure which overshadows its majority rival,[199] and his concurrence in the CIO labor publications case received the serious treatment it deserved.[200] So did his opinion for the Court in the *Panhandle Eastern Pipeline* case,[201] involving the relation of state and federal natural gas regulations. One of his most fluent opinions was the concurring blast at the Illinois procedural run-around confronting prisoners claiming constitutional rights.[202] The opinion expresses all the indignation of which Rutledge is capable, and this is a very satisfying quantity indeed.

Justice Burton's treatment of each case before him continued to be so meticulous that he could deal with only a few. He wrote four opinions for the Court as well as several dissents. This figure distorts the picture slightly, because the re-negotiation cases were really three distinguishable matters written as one opinion.[203] Their importance and treatment have already been discussed. His opinion in the *Bute* case[204] reaffirms the proposition that the right to counsel does not extend to state defendants and is an extended reaffirmation of the 1942 Roberts opinion in *Betts v. Brady*.[205] Burton's other majority opinions were on minor matters.

Every now and then Justice Burton emerges from the mass of detail which usually interests him and writes a crisp opinion. A dissent in a minor patent case is an example of such clarity.[206] From the standpoint of effec-

[197] 68 S. Ct. 1253 (1948).

[198] United States v. Scophony Corp., 333 U.S. 795 (1948); and United States v. National City Lines, 68 S. Ct. 1169 (1948).

[199] 68 S. Ct. 868, 875 (1948).

[200] 68 S. Ct. 1349, 1361 (1948).

[201] 332 U.S. 507 (1947).

[202] Marino v. Ragen, 332 U.S. 561 (1947).

[203] Lichter v. United States, 68 S. Ct. 1294 (1948).

[204] 333 U.S. 640 (1948).

[205] 316 U.S. 455 (1942).

[206] Funk Bros. Seed Co. v. Kalo Inoculant Co., 333 U.S. 127 (1948).

tive expression, the dissent in the *Von Moltke* right to counsel case was probably the best Burton opinion.[207]

CONCLUSION

One cannot in fairness press together the vagaries of an institution, as reported in the pages above, and say in a phrase: This was the Supreme Court in the year just passed. There was little of unity and much of dissent and concurrence, not only in the given case but also in the given area.

Yet if little either great or clear-cut emerged in this year, there was much that was satisfying. The application of the laws protecting competition at least did not retrogress, and there were some real advances for civil liberty.

[207] 332 U.S. 708 (1948).

THE ORGANIZED MUSICIANS: I

VERN COUNTRYMAN*

TRADE-UNIONISM, which found little favor among most other white-collar employments until the period of the last depression, got a substantial start among those employed in the entertainment industry a half century earlier. One of the oldest and strongest of the labor unions in that industry is the American Federation of Musicians. Yet, despite its long and active history, little was known of this organization outside its own trade circles until very recently. The man in the street had never heard of the Federation, and standard treatises on labor relations, keyed to the factory pattern, gave it scant acknowledgment.[1] Within the past few years, however, six congressional investigations and a considerable amount of other publicity have given us more information about the AFM—we now know that its President is James Caesar Petrillo, that he does not like phonograph records, and that the pundits of the press are quite uniformly agreed that his middle name is most appropriate. And on the basis of this information, many have reached the conclusion that Congress should "do something" about Petrillo and his organization.

It is the purpose of this article to undertake a somewhat more thorough study of the matter: to examine the history and the activities of the AFM in an attempt to discover how it functions, what its objectives are, to what extent its activities have been subjected to regulation, and to what extent those activities suggest the need for further governmental intervention.

FORMATION OF THE UNION

The history of organization among musicians in the United States covers a period of almost ninety years, beginning with the formation of the Aschenbroedel Club in New York City in 1860.[2] Social rather than business reasons inspired this organization and when, four years later, the Club was incorporated as the Musical Mutual Protective Union in order to

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[1] See, e.g., Stein and Davis, Labor Problems in America (1947); Daugherty, Labor Problems in American Industry (5th ed., 1941).

[2] Commons, Types of American Labor Unions—The Musicians of St. Louis and New York, 20 Q.J. Econ. 419, 424 n. 1 (1906), revised and reprinted in Commons, Labor and Administration 217 (1913).

facilitate the acquisition of a club building, the incorporating Act defined the purposes of its founders to be "the cultivation of the art of music in all its branches, and the promotion of good feeling and friendly intercourse among the members of the profession, and the relief of such of their members as shall be unfortunate. . . ."[3]

Members of the MMPU soon discovered, however, that their mutuality of interest extended beyond cultivation of the art and of good fellowship and included also a common concern in problems of employment. To bring the strength of their organization to bear on these problems, they obtained an amendment to the charter which added to the objectives of the MMPU "the establishment of a uniform rate of prices to be charged by members of said society, and the enforcement of good faith and fair dealing between its members."[4] Thus armed, MMPU proceeded to prescribe the prices to be charged by its members for all professional engagements. And, to encourage non-affiliated musicians to join the society and thus bring themselves under the price schedules, rules were adopted making it a "breach of good faith and fair dealing," punishable by fine or expulsion, for a member to perform in any band or orchestra where non-members were also performing.[5] MMPU thus became a business organization as well as a fraternal society. But no right-thinking member would have seen any similarity between its function and that of a labor union. Musicians were not "laborers"—they were "artists."

Musicians in other cities soon followed the New York example. The St. Louis Aschenbroedel Club was organized in 1864 and the St. Louis Musicians' Mutual Benefit Association a year later. The New York pattern was varied somewhat in an attempt to guard against judicial interference with disciplinary activities of the Association.[6] The Aschenbroedel Club was incorporated to hold title to the club building, and the MMBA, which promulgated and enforced rules fixing prices and forbidding performance

[3] N.Y.L. (1864) c. 168, § 2.

[4] N.Y.L. (1878) c. 321, § 1. The amendment expresely provided: "It shall be lawful for said society . . . to fix and prescribe uniform rates of prices to be charged by members of said society for their professional services. . . . And any member of said society violating any . . . by-law may be expelled from said society. . . ."

[5] For an unsuccessful attempt to enjoin enforcement of these rules, see Thomas v. MMPU, 121 N.Y. 45, 24 N.E. 24 (1890).

[6] In a number of New York cases expelled members secured writs of mandamus to compel reinstatement and money judgments for damages because the courts disagreed with MMPU on the interpretation of its by-laws. People ex rel. Merscheim v. MMPU, 47 Hun. (N.Y.) 273 (1888); People ex rel. Deverell v. MMPU, 118 N.Y. 101, 23 N.E. 129 (1889); Merscheim v. MMPU, 55 Hun. (N.Y.) 608, 8 N.Y. Supp. 702 (1890); Schrader v. MMPU, 55 Hun. (N.Y.) 608, 8 N.Y. Supp. 706 (1890); Saase v. MMPU, 55 Hun. (N.Y.) 608, 8 N.Y. Supp. 933 (1890).

with non-members, was organized as an unincorporated association.[7] Other mutual benefit societies followed. Either as incorporated bodies or as unincorporated associations, they were formed throughout the United States. And each of them set up a scale of minimum prices and forbade its members to perform with non-members.

In 1886 some of these societies joined in the formation of the National League of Musicians, and within ten years the membership of the League included 101 local societies. Affiliation with the League did not, however, affect the functions of the local bodies. While the League was formed to deal with problems common to all the societies—and did present their complaints against the importation of foreign musicians to the immigration authorities and their protests against competition from military bands to the War and Navy departments—it had no power to prescribe rules binding upon the Locals, and they retained complete authority to adopt and enforce their own policies on membership, prices, benefit plans, etc.

One matter, though, the national organization did control: the question of affiliation of the League with a trade-union organization. From its inception the League had received numerous invitations to affiliate from both the Knights of Labor and the American Federation of Labor. Many of the young western societies, led by the St. Louis organization, favored affiliation with the AFL, but the older eastern societies, still bemused by the artist-laborer dichotomy, shunned any association with a trade-union. Because these older societies were also the largest and were favored both by the rule that each society should have one vote in the League convention for every 100 members and by a proxy system which allowed them to vote for smaller societies who could not afford to send delegates to the convention, the AFL's periodic invitations were regularly rejected.

The AFL countered by organizing several musicians' unions of its own, and in 1896 extended an invitation to all musicians' organizations to meet at Indianapolis and form a new national organization. At this convention, attended by 19 societies of the League and 5 AFL unions, the American Federation of Musicians was formed as a national[8] federation affiliated with the AFL.

The League's retaliatory policy of expelling every Local which affili-

[7] Commons, op. cit. supra note 2, at 423. The fears of the St. Louis Association proved groundless, however. In Froelich v. MMBA, 93 Mo. App. 383 (1902), an expelled musician was refused judicial assistance in regaining his membership on the ground that the Association was a combination in restraint of trade.

[8] In 1900 the AFM expanded its jurisdiction to include Canadian musicians and thus, in trade-union parlance, became an "international" federation.

ated with the AFM[9] resulted by 1902 in reducing the League to a total of three locals, while the AFM, in addition to acquiring 98 former League affiliates, had 99 additional unions of its own, including competing Locals in the home cities of the three League hold-outs—New York, Philadelphia, and Baltimore.

Finally, in 1903, an understanding was worked out whereby the New York MMPU agreed, after receiving assurances that some measure of local independence would be retained and that its corporate identity would be preserved, to merge with the AFM's New York Local.[10] The Baltimore MMPU and the Philadelphia Musical Association capitulated immediately afterward, and the Federation, claiming over 30,000 members, could then boast that it represented 80% of the professional musicians in the United States.[11]

STRUCTURE AND POWERS OF THE FEDERATION

The musicians who formed the AFM had learned that little could be done to further their interests merely by bringing delegates from local societies together once a year in a national convention to discuss their problems. Some sort of central authority, with power to enact rules binding on the Locals and with further power to act between conventions, was necessary. But they had also learned, in the course of their campaign to bring about affiliation with the AFL, that some measures must be taken to insure representation of all local interests in the national organization. Consequently, the Constitution and By-Laws of the AFM reflect an attempt to strike a compromise between adequate national authority and effective local representation.

Legislative powers are exercised, and national officers[12] are elected for one-year terms by the national convention, which is required to meet annually.[13] In this convention, each Local has one vote for each 100 members

[9] Local League societies also expelled members who tried to maintain membership in both League and AFM Locals. See Weiss v. MMPU, 189 Pa. 446, 42 Atl. 118 (1899). AFM policy was to require Locals chartered by it in jurisdictions already occupied by a League society to grant AFM membership at a nominal initiation fee to the entire body of the League society. See O'Brien v. Musical Mutual Protective & Benevolent Union, 64 N.J. Eq. 525, 54 Atl. 150 (1903).

[10] See Fuerst v. MMPU, 95 N.Y. Supp. 155 (1905). Similar concessions were made to induce a number of other League societies to affiliate with the Federation, and many AFM Locals are still incorporated.

[11] International Musician 13 (Aug. 1903).

[12] A President, Vice-President, Secretary, and Secretary-Treasurer, plus an Executive Board made up of these officers together with five members elected at large, at least one of whom must be a resident of Canada. AFM Const. Art. VIII (1947).

[13] Ibid., Art. IV. This mandate has been faithfully observed, save for the years 1943 and 1945 when, with prior authorization from the 1942 convention, national officers canceled the conventions because of the war-time transportation shortage.

subject, originally, to a maximum of ten votes for any one Local. Of course, this limitation pleased all but the Locals limited by it, the chief objector being the largest Local—New York's No. 310. In 1906 the New York objections culminated in a proposal to eliminate the ten-vote rule, but the convention, after listening to President Weber's reminder of the control exercised in the old National League by a few large Locals, adopted a compromise provision—still in effect—under which the ten-vote rule is retained for the election of officers but may be lifted on demand of ten delegates or five Locals in the enactment of laws, all laws so enacted to be subject to veto by a committee consisting of the Executive Board and the chairmen of all other national committees.[14]

In the interim between conventions, the President of the Federation was originally given authority to "decide cases of an emergency" and, subject to this power, the national Executive Board was authorized to legislate in emergencies. The 1911 convention adopted President Weber's suggestion that the By-Laws be amended "for a clearer understanding of the existing laws"[15] to authorize the President to issue "executive orders binding upon all members and Locals if, in his opinion, the enforcement of the Constitution and By-Laws and Standing Resolutions of the Federation make such course necessary." As again amended a few years later and finally revised in 1930, this provision now authorizes the President also to "annul and set aside" the Constitution, By-Laws, and Standing Resolutions "and substitute therefor other and different provisions of his own making" whenever in his opinion such action is necessary "to conserve and safeguard the interests of the Federation, the Locals and/or members,"[16] and the powers of the Executive Board have also been expanded, though to a lesser extent.[17]

Theoretically, these provisions give the President and the Executive Board unlimited power to determine policies of the organization, and critics of the union point to them as evidence of "dictatorship." But, at least in the last decade, there have been only two instances of the use of those powers, neither of which was of a sort to occasion alarm.[18] And since

[14] AFM Const. Art. V (1947).

[15] International Musician 5 (June 1911).

[16] AFM By-Laws Art. I, § 1 (1947).

[17] "Matters not covered by the Constitution or By-Laws shall be in the discretion of the Executive Board, which Board shall have power to adopt such rules, supplementing said Constitution and By-Laws, or covering any matter not contained therein, as it may deem proper, in adddition to determining and announcing the policies of the Federation, all of which rules, matters and policies shall have equal force and effect with the Constitution and By-Laws." AFM By-Laws Art. I, § 6-A (1947).

[18] Early in 1942 Petrillo set aside an obviously out-dated By-Law providing for termination of membership of any musician who entered the military service and substituted a rule saving

the Standing Resolutions, By-Laws, and even the provisions of the Constitution can be amended or repealed by a majority vote of the annual convention,[19] the extent of authority delegated to the Federation is always within the discretion of the convention. The tendency, however, has been toward constantly increasing the powers of the national body.

The original By-Laws provided that the Federation should not "enact any law or measure of a general and universal death benefit or insurance assessment nature,"[20] and control over all benefit plans is still left with the Locals. Originally, too, no power to negotiate wage scales was given to the national officers, and, with some rather large exceptions to be noted later, that is still the practice.

It is with respect to qualifications for membership that the Federation imposes the greatest limitations upon local autonomy. At the outset, the Federation sought to organize all who worked professionally as instrumental musicians; subsequently, it extended its jurisdiction to include those working as copyists, arrangers, music librarians,[21] and conductors.[22] Since anyone who performs in any of these capacities for hire is a potential threat to the wage standards which the AFM sets for its members, and since the power of the Federation to set those standards depends upon the extent to which it represents such performers, the AFM is interested in bringing all of them into its Locals. For trade-union purposes, their skill as musicians is not nearly as important as their ability to secure employment as musicians—if they are skilful enough to do that, protection of the AFM's other members demands that they become members also. Consequently, while it was the artist who inserted in the original By-Laws a rule that all applicants for membership should be tested by an Examining Board appointed in each Local,[23] it was the trade-unionist who inserted another providing that "[p]erformers on musical instruments of any kind who render musical services for pay are classed as professional musicians and are eligible for membership, subject to the laws and jurisdiction of the A.F. of M.,"[24] and backed it up with a provision that "[a]ny Local law prohibiting the admission of any competent musician, male or female"

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the membership and relieving the musician of dues and assessments during his military service. AFM By-Laws Art. X, § 4 (1947). Later in the same year, as part of a successful campaign to induce the Boston Symphony Orchestra to abandon a sixty-year open shop policy and sign a union contract, he set aside a By-Law to which the Boston organization objected, which forbade the importation of symphony musicians from the jurisdiction of another Local without the consent of such Local.

[19] AFM By-Laws Art. XVII, § 1 (1947).

[20] International Musician 6 (July 1903).

[21] AFM Const. Art. III, § 1 (1947).

[22] AFM By-Laws Art. X, Preamble A (1947).

[23] Ibid., Art. IX, § 6.

[24] Ibid., Art. XV, § 1.

over the age of 16, should be void.[25] While the Examining Boards have some discretion in passing on the "competence" of the applicant, as a matter of practice any musician who has demonstrated that he is competent to secure a paid engagement is eligible for membership.[26]

There are no racial barriers to membership, although the AFM is one of a diminishing number of labor unions[27] which restricts Negroes to Jim Crow Locals. Citizenship is not a prerequisite, but an alien applicant for membership must have taken out his first papers and after admission must complete his naturalization "within the shortest possible time provided by law."[28] Since 1940 the national By-Laws have directed all Locals to expel Communists and Fascists, but this provision seems to have been the product of war-time exhilaration rather than of contamination in the membership.[29] There are no rules designed to limit membership—the AFM is an "open union."

Keeping the Locals "open" was not enough, however, to remove all local obstacles to affiliation. A member might change his residence from the jurisdiction of his own Local to that of another—those who worked full-time as musicians frequently did. Such a member, having once paid an initiation fee to one Local in order to become an AFM member, was not enthusiastic about paying another initiation fee simply to retain that membership, especially if he had not yet determined whether he would be able to make a living in the new locality. Moreover, he might have some interest in the benefit plans of his original Local which he wanted to retain. Members of the second Local, on the other hand, frequently did not welcome new competition and were not at all disposed to waive their initiation fee in order to clear the way for it. Certainly they would not waive

[25] Ibid., Art. IX, § 15.

[26] Still accurate is President Weber's 1904 description of the membership policy: "The A. F. of M. is a unique organization; it does not only represent those that follow Music exclusively for a livelihood, but it represents also those who do not even in a major part depend upon Music for their maintenance. It follows, therefore, that every Instrumental Performer receiving remuneration for his services is eligible for membership." International Musician 1 (June 1904).

[27] See Summers, Admission Policies of Labor Unions, 61 Q. J. Econ. 66, 68–72 (1946).

[28] AFM By-Laws Art. IX, § 9 (1947).

[29] Ibid., §§ 9–11. Even the House Committee on Un-American Activities would have difficulty finding cause for alarm in the AFM unless it be in the fact that the only AFM officials to file the non-Communist affidavits required by § 9(h) of the Taft-Hartley Act are the officers of West Palm Beach Local 806. Letter from Jay Shanklin, Assistant Director of Information, National Labor Relations Board, June 8, 1948. But, aside from matters of principle, this ommission is quite probably due to the improbability of the AFM ever having occasion to resort to the representation and complaint proceedings for which such filing is a prerequisite, as well as to the Federation's hostility to the Taft-Hartley Act in other respects.

that fee where membership in their Local also included rights under benefit plans.

To meet this problem, the 1902 convention adopted a "universal membership law," under the provisions of which any musician who has been a member of one Local for six months may, upon moving into the jurisdiction of another, take out a transfer card which when deposited with the second Local together with payment of current dues entitles him to limited performing rights in the new jurisdiction for a period of six months.[30] At the end of that time, he must pay the local initiation fee and become a full member. Until he has paid that fee, the transfer member is not entitled to vote, hold office, or share in the benefit plans of the second Local, but that Local may not refuse him full membership upon tender of the initiation fee at the expiration of the six month period. The musician need not forfeit membership in his original Local upon becoming a member of a second, if he is willing to pay the dues and assessments of both.[31]

When some of the Locals reacted to this rule by increasing their initiation fees, the Federation moved to limit local powers in that field also.[32] In this endeavor it was somewhat embarrassed by promises made to some of the former League societies at the time of their transfer to the AFM guaranteeing that there would be no interference with their initiation fees; but, after President Weber had construed this promise to apply only to the Local fee existing at the time the promise was made and not to any subsequent increase, the 1912 convention adopted a $50 maximum for Local initiation fees, accommodating those Locals whose fees exceeded that amount at the time the promise of non-interference was made by a proviso that enforcement of the limitation should be left to the discretion of the Executive Board.[33]

This limitation on initiation fees is but one manifestation of a fiscal pol-

[30] "[W]here a Local maintains a law defining a steady engagement as one consisting of three or more days per week, for one particular employer, for two or more consecutive weeks, then transfer members . . . cannot, without the consent of the Local, accept such steady engagement . . . for a period of three months from date of depositing transfer card. . . ." AFM By-Laws Art. XII, § 4-H (1947). An attempt of the Boston Local to enforce this provision against a transfer orchestra leader by refusing to allow Local members to perform with him in a radio station orchestra was enjoined in a suit brought by the operator of the radio station in Yankee Network v. Gibbs, 295 Mass. 56, 3 N.E. 2d 228 (1936).

[31] AFM By-Laws Art. XII, § 8 (1947).

[32] From the beginning the Federation had required a $5 minimum initiation fee. AFM By-Laws Art. III, § 4 (1947). In 1905 the AFM membership, on referendum vote, rejected a proposal to eliminate all initiation fees for transfer members.

[33] AFM By-Laws Art. IX, Preamble A (1947). The Executive Board is also authorized to "determine whether or not members paying such a fee shall be entitled to the benevolent and property rights of the Local which they join, provided Locals which grant such benevolent and property rights heretofore maintained an initiation fee exceeding $50.00."

icy calculated to encourage union affiliation. Although the Federation has never found it necessary to impose a similar limitation on Local dues, those charges average only $8 to $10 a year and do not exceed $20 in any instance. National dues consist of a per capita tax of $1.25 per year paid by the Local.[34] These charges, however, constitute a minor source of revenue. The principal income of both the Locals and the Federation is derived from taxes upon the earnings of employed members. The musician employed in making sound pictures pays a 1% tax into the National Theater Defense Fund.[35] Traveling bands and orchestras pay a 10% tax, of which 40% goes to the Local in whose jurisdiction the engagement is played, 30% goes to the Federation, and 30% is returned to the members who played the engagement,[36] except when such traveling bands play radio engagements, in which case the tax is 15% and is allocated 80% to the Federation and 20% to the Local in whose jurisdiction the engagement is played.[37] In addition to these taxes, all of which are imposed by national rules, the Locals are authorized to assess additional taxes, not to exceed 4%, on any engagements for which the national rules prescribe no tax.[38]

The Federation also exercises an appellate supervision over Local action in expelling members for nonpayment of dues and assessments or for violation of union rules. Any member so expelled may get a stay of judgment from the national President and may have his case reviewed by the Executive Board, with a further right of appeal to the national convention.[39] Although most expulsion proceedings originate at the local level, the Executive Board is also authorized to act in the first instance to expel any member who "in any way places obstacles in the way of the successful maintenance of a Local or violates any law, order or direction, resolution or rule of the Federation."[40]

In addition to the powers vested in the Federation with respect to expulsion of members, the national President or the Executive Board is empowered to suspend or remove from office any Local officers found guilty of "neglect of duty, interference with or violation of any of the provisions of

[34] AFM By-Laws Art. III, §§ 6, 7 (1947). Thirty cents of this tax represents the subscription price for the International Musician.

[35] AFM By-Laws Art. III, § 11-A (1947).

[36] Ibid., Art. XIII, Preambles A, H.

[37] Ibid., Art. X, § 2-D.

[38] Except that Locals are forbidden to tax recording engagements played by traveling orchestras. AFM By-Laws Art. IX, § 38 (1947).

[39] Ibid., Art. XI, Preamble A, § 12. The complaining party also has a right of appeal from a Local decision in favor of an accused member. See Gorden v. Tomei, 144 Pa. Super. 449, 19 A. 2d 588 (1941); Rubens v. Weber, 237 App. Div. 15, 260 N.Y. Supp. 701 (1930).

[40] AFM By-Laws Art. X, Preamble A (1947). No provision is made for hearing or appeal, although as a matter of practice a hearing before the Executive Board is accorded.

the Constitution, By-Laws, Standing Resolutions, orders or directions of the Convention, the President or the Executive Board . . . or of any of the purposes, objects or affairs of the Federation."[41] Further, the Executive Board is authorized to expel any Local for "violating or failing to comply with any provision of the Constitution . . . , By-Laws . . . , Standing or Special Resolutions or directions of any Convention or any order, direction or verdict of the Executive Board . . . or any duly authorized officer of the Federation. . . ."[42]

The respective powers of the Federation and the Locals in the matter of expulsion of members, Local officers, and Locals were tested in a series of battles in the New York courts which arose out of the only serious revolt provoked by the Federation's limitations upon local autonomy.

The conflict began in 1920[43] when Local 310 and the managers of New York vaudeville houses reached an impasse on the Local's demands for a 50% wage increase. Pursuant to the national By-Laws, the managers appealed to the Federation[44] and the national officers, with the assistance of Local President Finkelstein, negotiated a 40% increase which was ratified by the members of the Local over the protests of a majority of its Board of Directors. Shortly thereafter the Board of Directors preferred charges against Finkelstein (refusal to consider motions properly put at Directors' meetings, execution of pay warrants for a sergeant-at-arms whose appointment the Board had refused to confirm, etc.) and suspended him from office pending trial—all in accordance with Local by-laws. Finkelstein appealed to President Weber, who invoked his emergency powers and ordered the Directors to stay their proceedings. When they disregarded this order, he issued another expelling them from the Local. The Directors then applied to the courts for an injunction against enforcement of the expulsion order and got it on two grounds: 1) Since Local 310 was also the Musical Mutual Protective Union, a New York corporation, its internal

[41] AFM By-Laws Art. I, § 1 (1947). No provision is made for hearing or appeal.

[42] AFM By-Laws Art. IV, § 2 (1947). The Executive Board must try the case "either (1) by the production of witnesses and the taking of testimony before it, or (2) the submission . . . of affidavits or other written proof or documents in support and in defense of such charges." Ibid., Art. IV, § 6. No provision is made for appeal.

[43] Some local resentment was generated earlier when the national officers in August 1919 called the New York musicians out of the legitimate theaters in support of the Actors' Equity strike for recognition and a standard contract. Harding, The Revolt of the Actors 141–43 (1929); Gemmill, Collective Bargaining by Actors 11–12 (1926).

[44] "The appeal of an employer is considered an affair of the Federation, and therefore the Convention, the International Executive Board or the President of the Federation, as the case may be, may assume the same jurisdiction in such appeal as they exercise in all other cases properly coming before them under the laws of the Federation." AFM By-Laws Art. XI, Preamble F (1947).

affairs were governed by New York law. That law authorized the union to promulgate by-laws, and under those by-laws there was no cause for expulsion of the Directors, regardless of what the rules of the AFM might provide. 2) In any event, the powers conferred on the national President by AFM By-Laws would not be construed to include the power to expel Local Directors without hearing.[45]

This might have ended the dispute had not the Local Directors chosen this occasion to raise another issue. Local 310, exercising jurisdiction over what was then the Mecca for all aspiring musicians, was the chief recipient of transfer cards, and its compliance with the universal membership law had always been grudging. Now the already disgruntled Board of Directors refused to honor a number of transfer cards presented to it. After notice and opportunity for hearing, the AFM Executive Board expelled the Local for this violation of AFM By-Laws and created Local 802 to replace it. When the officers of Local 310 again sought judicial relief they were unsuccessful—the New York corporation laws did not apply to the Local's affiliation with the AFM and the expulsion procedure was in strict compliance with AFM rules.[46] MMPU attempted for a time to function as an independent union in competition with new AFM Local 802, but New York theater managers proved eager to co-operate with the AFM by abrogating their contracts with MMPU,[47] and its members soon found it expedient to join the new Local. MMPU now exists solely for the purpose of renting the building owned by it.[48]

But peace did not return to New York with this victory over MMPU. In creating Local 802, the national officers had provided in its by-laws for a governing board, all members of which were to be selected by the AFM Executive Board, and had further provided that the by-laws could be amended only with the consent of that Board. When thirteen years of agitation resulted only in a concession allowing local election of a minority of the governing board, the membership of the Local in 1934 adopted resolutions providing for a special meeting to adopt new by-laws regardless of national approval and for a special election to select a full governing board. When certain members went forward with arrangements to

[45] Kunze v. Weber, 197 App. Div. 319, 188 N.Y. Supp. 644 (1921); see also Werner v. Weber, 197 App. Div. 326, 188 N.Y. Supp. 648 (1921).

[46] MMPU v. Weber, 123 N.Y. Misc. 182, 205 N.Y. Supp. 599 (1924), aff'd 245 N.Y. 626, 157 N.E. 885 (1927); see also Taussig v. Weber, 123 N.Y. Misc. 180, 205 N.Y. Supp. 605 (1924).

[47] Langley, The Musician: Artist and Laborer, 113 Nation 262 (Sept. 7, 1921).

[48] In order to induce Local 802 to rent the building in 1930, MMPU was forced to secure an amendment to its charter, changing its name to Musical Mutual Corporation and eliminating its powers to fix prices for musical engagements and to prescribe rules of "good faith and fair dealing" between members. N.Y.L. (1930) c. 563.

carry out these resolutions, they were fined by the Local for violation of Local by-laws, expelled for failure to pay the fine, and fined by the AFM Executive Board for "placing obstacles in the way of the successful maintenance of Local #802" and expelled for failure to pay that fine.

Nonetheless, and probably in part because members of Local 802 took their complaint to the Copeland Committee which was then investigating "racketeering,"[49] the Federation granted the Local authority to elect all officers except the chairman of the governing board, who was to be selected by the AFM Executive Board for an additional two years. And when, in actions brought by the expelled members, the New York Supreme Court granted temporary restraining orders accompanied by opinions indicating that it entertained serious doubts as to whether there had been any violation of the national By-Laws and as to the fairness of the expulsion procedure followed by both the Local and the Federation,[50] the expelled members were reinstated and the Local was authorized to elect its own chairman also. With this capitulation by the Federation, Local 802 acquired the same independence in the conduct of its internal affairs as is enjoyed by all other AFM Locals.

But the independence of all Locals has given way to the necessity for national control in other areas. One problem which the Locals were not competent to handle was that of traveling bands. Each Local wanted its own members protected against underbidding by such bands but had no authority to discipline traveling musicians who belonged to other Locals. On the other hand, the traveling bands frequently were not content with the wage scale prevailing in the various communities in which they appeared, but their own Locals could not aid them in their dealings with employers in other jurisdictions. Accordingly, the 1904 convention adopted an elaborate schedule of prices to be charged by traveling bands for various types of engagements (subject in all instances to a higher Local scale in the jurisdiction where the engagement was performed), and control over such prices has been exercised by the national convention since that time.[51]

[49] Hearings before Subcommittee of Committee on Commerce pursuant to S. Res. 74, 73d Cong. 2d Sess., Vol. II, at 1–125 (1934).

[50] Koukly v. Canavan, 154 N.Y. Misc. 343, 277 N.Y. Supp. 28 (1935); Koukly v. Weber, 154 N.Y. Misc. 659, 277 N.Y. Supp. 39 (1935).

[51] Current prices for traveling bands and orchestras are set out in AFM By-Laws Arts. XIII and XIV (1947). Members who violate these price schedules may be tried by the Local in whose jurisdiction the violation occurred, or by the national Executive Board, or by a Traveling Committee consisting of three members of the Executive Board. If the penalty imposed is a fine of $500 or more, or expulsion from the union, an appeal may be carried to the national convention. Ibid., Art. XI, § 3-A. See Fales v. Musicians' Protective Union, 40 R.I. 34, 99 Atl. 823 (1917).

Further national supervision of the engagements of individual members was secured in 1936 when the convention adopted a system of licensing for booking agencies. Since 1913 the By-Laws have forbidden AFM members to enter employment relations except through "contractors,"[52] who are also AFM members, but the contractor is merely one of the musicians—usually the orchestra leader—who represents the orchestra in all dealings with the employer after an engagement is secured.[53] At least in the case of the "name bands" the contractor does not secure the engagements. That function is discharged by the same booking agencies who handle engagements for others in the entertainment field. Because some of these agencies had been guilty of abuses common to private employment offices, and because the Supreme Court had decided that such agencies were not subject to state regulation,[54] Actors' Equity Association had in 1928 adopted a plan requiring booking agencies representing its members to operate under a license issued by the Association, the license providing for more favorable terms for the actors than had previously prevailed in contracts between actor and agency. After this plan had been tested in practice and in court,[55] the AFM adopted it also. Under the AFM version, members are forbidden to do business with an agent not licensed by the national Executive Board, and the license is terminable at will by the Board. Under the terms of the license, the agent agrees to act for no musician not affiliated with the AFM, to secure engagements on terms conforming to AFM rules and wage scales, to receive no payment for his services until the musicians have been paid, and to guarantee their payment.[56] Moreover, any contract he may make with AFM members must provide for cancellation if he fails to secure for them at least forty weeks' employment per year.[57]

The AFM also attempts, by ad hoc action, to protect local musicians from too much competition from traveling bands. See Eddyside Co. v. Seibel, 142 Pa. Super. 174, 15 A. 2d 691 (1940).

[52] AFM By-Laws Art. X, § 29 (1947).

[53] For social security tax purposes the leader-contractor rather than the proprietor of the establishment where the engagement is played may be the "employer"—despite the best efforts of the AFM to avoid that result by contract. Bartels v. Birmingham, 332 U.S. 126 (1947); Establishment of Employment Relationships by Collective Agreement, 15 Univ. Chi. L. Rev. 716 (1948).

[54] Ribnik v. McBride, 277 U.S. 350 (1928).

[55] Edelstein v. Gillmore, 35 F. 2d 723 (C.C.A. 2d, 1929), cert. den. 280 U.S. 607 (1930).

[56] AFM Standing Resolution No. 51 (1947). The requirement that the agent guarantee payment on all engagements was added last year. Previously the agent had been required to guarantee the price of all single engagements booked with an employer "not regularly engaged in the business of employing musicians." The 1947 change produced such strong protests from the booking agencies that the AFM Executive Board recently agreed to enforce it only where the Board finds that the agent was "negligent" in booking the engagement. Variety, p. 26 (Feb. 4, 1948).

[57] AFM By-Laws Art. X, § 54 (1947).

It is in matters of membership, traveling bands, and booking agencies that the Federation has exercised the greatest control throughout the entire entertainment industry. In certain branches of that industry, national control has been extended even further, but those developments will be considered in connection with the problems which inspired national action.

EXTENT OF UNIONIZATION

The AFM has been able to enforce its booking agency license requirements and its price scales on traveling bands for the same reason that it has been able to maintain closed shop conditions in practically all situations (with or without written agreements) for the last thirty years.[58] Virtually all musicians in the United States who play for hire are members of the AFM.

This situation did not follow immediately upon the creation of the Federation. That event presaged the end of organized opposition to affiliation with a trade-union, but it did not at once determine that the AFL should be the trade-union with which all musicians' organizations would affiliate. Shortly after dissolution of the National League, the near-defunct American Labor Union launched a campaign to organize musicians through its International Musical Union, and the expiring Knights of Labor set out to muster new support for its cause in the musical field. At the same time, an independent American Musicians' Union, aided by an Illinois court's injunction against AFM interference,[59] was giving AFM Local 10 a stiff battle in Chicago.

These competing organizations achieved their greatest strength in 1909 when, claiming an aggregate membership of 20,000, they joined forces to form the American International Musical and Theatrical Association.[60] This Association lasted about six years, but the AFM's supremacy was never seriously jeopardized. It entered the contest with 56,000 members, Locals in 500 cities and towns, and a strong national organization. In 1913 it gained additional strength by forming a mutual assistance pact with the stagehands' International Alliance of Theatrical Stage Employees, whereby either union could, if involved in a dispute with an employer, require the other to call its members out on sympathy strike.[61] A year later

[58] For an early example of closed shop conditions secured by organization rather than by contract, see Rhodes Bros. Co. v. Musicians' Protective Union, 37 R.I. 281, 92 Atl. 641 (1915).

[59] See American Musicians' Union v. Chicago Federation of Musicians, 184 Ill. App. 444 (1913).

[60] New York Times, p. 3 (April 13, 1909).

[61] Baker, The Theatrical Stage Employees and Motion Picture Machine Operators Union 78 (1933).

the AFM adopted a policy of enforcing "closed shop conditions when and wherever consistent"[62] and by 1915 the opposition was sufficiently reduced so that that policy could be "consistently" enforced almost everywhere. The American Musicians' Union retained some strength in Chicago for a few years thereafter but subsided into inactivity shortly after the former President of its Chicago Local, one James C. Petrillo, left its ranks in 1917 to join AFM Local 10,[63] and the AMU was finally absorbed by Local 10 in 1937.

The Federation's only other battle for control of musicians took place within the AFL family.[64] Although the AFM had always claimed jurisdiction over grand opera and symphony orchestras,[65] it had not attempted, prior to 1940, to organize solo instrumentalists, accompanists, and conductors performing with such orchestras. Such performers were not easily converted to trade-unionism and even if unaffiliated they constituted no serious threat to union standards. But in 1936 Lawrence Tibbett and others formed the American Guild of Musical Artists, with membership open to singers, ballet dancers, choreographers, solo instrumentalists, conductors and accompanists in grand opera and concert work. The Guild succeeded in enlisting a considerable number of instrumentalists and conductors, and in 1937 it affiliated with Associated Actors and Artists of America, the parent body to which all AFL entertainers' organizations other than the AFM and the recently chartered Radio Directors' Guild belong. While the Federation was willing to leave these performers unorganized, it was not willing to have them represented by another union. Accordingly, in 1940 it notified the Guild, the booking agencies, and the employers of such performers that AFM members would not perform with any accompanist, instrumental soloist, or conductor who was not an AFM member. But when the Department of Justice threatened an anti-trust investigation[66] and the Guild persuaded the New York Court of Appeals that its complaint, setting out the above facts, stated a proper case for injunction despite the provisions of New York's anti-injunction statute,[67] a com-

[62] AFM By-Laws Art. IX, § 23 (1947).

[63] In 1922 Petrillo became president of Local 10, a position which he still holds.

[64] The CIO got nowhere in its 1937 attempt to recruit all types of theater workers, including musicians, into a "United Theatrical and Motion Picture Workers' Union," although its tender of a charter to the old American Musicians' Union in Chicago did inspire AFM Local 10 to bring the AMU remnants into its ranks.

[65] For some indication of the achievements of AFM Locals in attempting to secure higher wages for members of such orchestras, see Grant and Hettinger, American Symphony Orchestras 101–9 (1940).

[66] New York Times, p. 7 (March 1, 1941).

[67] American Guild of Musical Artists v. Petrillo, 286 N.Y. 226, 36 N.E. 2d 123 (1941).

promise was reached whereby the Guild relinquished all claim to jurisdiction over conductors and accompanists, and the AFM agreed that the Guild should be the exclusive bargaining representative for instrumental soloists in the concert and opera fields—although soloists were required to hold membership in the AFM as well as in the Guild.

The effect of this settlement was to bring into the AFM the only substantial body of instrumental musicians not previously organized. There remained only one obstacle to virtually complete coverage—the Boston Symphony Orchestra still adhered to its traditional open-shop policy. But the AFM had addressed itself to that problem in 1940 by threatening to call its members out of any recording or broadcasting studio where the Orchestra was engaged, and after two years without broadcasting and recording fees the Boston organization capitulated.

Thus, by 1943 the AFM had practically every professional instrumental performer and conductor in the United States enrolled as a member. According to the Federation's count, its membership now totals 232,000. With adjustments to eliminate 10,000 Canadian members and to allow for duplicate memberships, there are probably about 200,000 members in the United States, 25% of whom are in three of the 730 Locals—28,000 in New York, 13,500 in Los Angeles, and 11,000 in Chicago.[68]

OBJECTIVES OF THE FEDERATION

Since his occupation is almost completely free from physical hazards, the musician has little interest in workmen's compensation laws and safety legislation.[69] In most cases his employment is too transitory for him to be greatly concerned about such matters as working conditions, seniority arrangements, and vacations. Since it is a rare engagement which calls for more than four hours of performance, he has no need of maximum-hours legislation. For the same reason, minimum wage legislation geared to the eight-hour day is of no value to him. And his union was so strong and so well organized by 1935 that it has had no occasion to invoke the certifica-

[68] International Musician 9 (June 1948); Hearings before Special Subcommittee of Committee on Education and Labor pursuant to H. Res. 111, 80th Cong. 1st Sess., at 191, 292, 381–82 (1947).

[69] Workmen's compensation statutes may become a matter of vital concern to the occasional musician who is injured on the job, and whose right to recover damages in a tort action or compensation under the statute may depend upon whether or not he is an "employee" of the proprietor of the place where the engagement was being played. And the determination of that point may be affected by the standard contracts devised by the AFM in an attempt to relieve orchestra leaders of responsibility for social security taxes. See Earle Restaurant, Inc. v. O'Meara, 160 F. 2d 275 (App. D.C., 1947), noted in 15 Univ. Chi. L. Rev. 716 (1948). But such cases are extremely rare, and the Federation has displayed no interest either in promoting workmen's compensation laws or in taking action to bring its members within the coverage of such laws.

tion machinery or the protection for collective bargaining activity provided by the Wagner Act.

In short, the Federation's primary concern has been with only two objectives: higher wages and more employment. Generally, the first of these has been pursued at the local level,[70] and even in those instances in which the national organization has intervened, its activities have not raised any special problems nor provoked any serious complaint from employers. It is to the second objective that the Federation has always addressed its principal efforts. And, in its constant endeavor to secure more work for its members, no possible threat to their employment opportunities has been regarded as either too large or too small to be attacked. It is this single-minded devotion to the employment problem which characterizes nearly all AFM activity and which has involved the union in its most serious difficulties.

"UNFAIR" COMPETITION

Military bands.—One problem which the AFM inherited from the National League was that of competition from musicians in the military service. Since such musicians could not be subjected to union discipline, the Federation made no attempt to organize them.[71] Instead, it sought to confine them to the military duties for which they were paid, and to keep them entirely out of the civilian market.

But the enlisted musicians, whose pay then as now was not munificent, persisted in seeking paid engagements during their free time. Moreover, many operators of theaters and many sponsors of parades and fairs found that the music of military bands was frequently preferable, aesthetically and/or economically, to that of civilian musicians—particularly was this true of the United States Marine Band. Seven years of indignant protest from the AFM about this "unfair" competition resulted in orders by the War and Navy Departments forbidding enlisted musicians to accept private engagements for less than prevailing union scales. But such orders were almost impossible to enforce and in any event did not satisfy the Federation's objection that enlisted musicians who were fed, housed, and paid to provide music for the military services should not be allowed to seek private engagements in competition with the civilian musician who depended on such engagements for his livelihood.

Accordingly, the union carried the battle to new fronts. It forbade its

[70] For accounts of the activities of one large Local, see Christenson, Collective Bargaining in Chicago 230–300 (1931); Twentieth Century Fund, How Collective Bargaining Works 848–66 (1942).

[71] See note 18 supra.

members to play paid engagements with enlisted musicians or to participate in any function where military bands were performing, "except when such bands are escorting the President of the United States or any officer or foreign guest thereof, or a military or naval commander."[72] And it began a campaign to secure legislation restricting enlisted musicians to their military duties.

To make its legislative proposals more palatable, the AFM coupled them with a demand for an increase in pay for all enlisted musicians. This strategy culminated in provisions in the Army and Navy Appropriation Acts of 1908 giving enlisted musicians a pay increase, with provisos that the "bands or members thereof shall not receive remuneration for furnishing music outside the limits of military posts when the furnishing of such music places them in competition with local civilian musicians."[73]

The AFM had hardly had time to celebrate this victory when the Attorney-General ruled that the statute applicable to Navy bands did not apply to the biggest competitor of all—the Marine Band.[74] Eight more years of lobbying were necessary to bring the Marine Band within the statutory prohibition against military competition and to widen that prohibition to include gratuitous performances by military musicians.[75]

Since the enactment of these statutes, AFM musicians have suffered little from military competition. Both the Army and the Navy have made conscientious efforts to enforce the statutory provisions,[76] and the AFM stands alert to call to their attention any possible instance of violation.

Foreign musicians.—The second, and more difficult, problem inherited from the National League was that of competition from foreign bands on tour in the United States. American managers found these bands much

[72] International Musician 6–7 (August 1903).

[73] 35 Stat. 110, 153 (1908), 10 U.S.C.A. § 905 (1927).

[74] 27 Ops. Att'y Gen. 90 (1908).

[75] A provision in the National Defense Act of 1916 requires that no enlisted man "in the Army, Navy and Marine Corps . . . shall . . . leave his post to engage in any . . . performance in civil life, for emolument, hire, or otherwise, when the same shall interfere with the customary employment and regular engagement of local civilians. . . ." 39 Stat. 188 (1916), 10 U.S.C.A. § 609 (1927), 34 U.S.C.A. § 449 (1928). And the Navy Appropriation Act of the same year provides that a member of the Marine Band "shall not, as an individual, furnish music . . . when such furnishing of music places him in competition with any civilian musician. . . ." 39 Stat. 612 (1916), 34 U.S.C.A. § 702 (1928). Although these provisions seem to apply only to the individual musicians and not to military bands, they are not so construed by military authorities responsible for their enforcement. Hearings before Committee on Interstate and Foreign Commerce on S. 63 and H. R. 1648, 79th Cong. 1st Sess., at 28–29 (1945).

[76] Lapses by the Navy in allowing the Marine Band to perform for radio broadcasts were corrected after Representative LaGuardia had introduced H. R. 5647, 72d Cong. 1st Sess. (1931) to restate the prohibition against military competition in more emphatic terms and the AFM had filed a protest with Congress. 75 Cong. Rec. 11038 (1932).

cheaper to employ than the native musicians, and in the days when pomp and circumstance was still a part of the show, such bands were popular as much because of their intriguing trappings and titles as because of the quality of their performances. Consequently, at the turn of the century American audiences were being offered such imported delicacies as "Ellery's Royal Italian Band," "Creatore's Royal Italian Band," "Jovine's Royal Italian Band," "Victor's Royal Venetian Band," the "Royal Hungarian Band," the "Royal Hawaiian Band," the "Royal English Red Hussar Band," and the "Royal Imperial Band of Wilna, Russia, Special Favorite of the Czar."

Because most of these bands were brought to the United States by American promoters, the AFM sought to invoke the protection of the contract labor laws. But those laws have always contained an exception for "artists,"[77] and, though the Federation's constant contention before immigration officials that musicians were "laborers" rather than "artists" had a considerable effect upon the terminology with which the union musician came to speak and think of his position in society, it had no effect upon the interpretation of the contract labor laws.

The Federation undertook, therefore, to secure appropriate amendments to those laws, and in the interim adopted a contract labor policy of its own whereby membership was denied to, and all members were forbidden to perform with, immigrant musicians who had secured a promise of employment in this country either before entering or before applying for AFM membership after entry.[78] Despite continuing pressure from the New York Local—recipient of most of the immigrants' membership applications—the Federation refused to expand this policy into one including all immigrants.

The legislative campaign against imported competition proved more arduous than the one against military competition, however, and it was not until the last depression had made Congress particularly sensitive to problems of employment that it could be persuaded to adopt a plan designed to meet the Federation's objections without at the same time depriving American music of the benefit of all foreign stimulation. The 1932

[77] 23 Stat. 332 (1885); 34 Stat. 899 (1907); 39 Stat. 876 (1917), 8 U.S.C.A. § 136(h) (1942).

[78] AFM By-Laws Art. IX, § 10 (1947); Ibid., Art. X, § 2-E. The principal reason for the AFM's refusal in 1909 of an invitation to join musicians' unions of England, France, Germany, Holland, Belgium, Denmark, Hungary, Switzerland, Spain, and Italy in the International Confederation of Musicians was that the laws of the Confederation provided that members of all affiliated organizations should have unrestricted opportunity to accept engagements in all countries. International Musician 8 (August 1909). The Federation still entertains similar fears about international affiliation. Hearings, op. cit. supra note 68, at 342.

Act[79] provides that "no alien instrumental musician shall, as such, be considered an 'artist' . . . within the meaning of . . ." the contract labor laws "unless—(1) he is of distinguished merit and ability . . ." and "(2) his professional engagements . . . within the United States are of a character requiring superior talent." While this Act must pose some nice problems for immigration authorities, it is not likely to deprive us of any real foreign talent, and it seems to have satisfied the Federation's concern over imported musicians.[80]

With the advent of radio broadcasting, however, foreign musicians became a source of competition even though not physically imported, and in December 1945 the AFM served demands on the broadcasting industry that it cease all broadcasts of foreign musical performances. This action was taken just in time to allow Congressman Lea to add an additional paragraph to a bill which he introduced in Congress the following January, and when finally passed three months later the Lea Act[81] provided:

(a) It shall be unlawful, by the use or express or implied use of force, violence, intimidation, or duress, or by the use of express or implied threat of the use of other means, to coerce, compel, or constrain a licensee. . . .[82]

(6) to refrain, or agree to refrain, from broadcasting or permitting the broadcasting of any radio communication originating outside the United States.

Apparently this provision has served its purpose—no instance of AFM interference with foreign broadcasts has been raised by the broadcasters since its enactment.

Amateurs.—The AFM, like any other labor union, represents only those of its craft who perform for hire. But, unlike most other labor unions, the nature of its craft is such that there are always a number of amateurs who are willing to perform without compensation. Proceeding on its usual premise that any musical performance represents a possible source of employment for union musicians, the Federation draws no distinction between a non-union musician who performs for pay and one who performs gratis. Both are performing where union musicians might otherwise be employed.

[79] 47 Stat. 67 (1932), 8 U.S.C.A. §§ 137b–137d (1942).

[80] H.R. 9045 and H.R. 8927, 74th Cong. 1st Sess. (1935); H.R. 12325, 74th Cong. 2d Sess. (1936); H.R. 30, 75th Cong. 1st Sess. (1937); and H.R. 1651, 76th Cong. 1st Sess. (1939), all of which would have put the admission of alien actors and musicians on a reciprocity basis, were opposed by the AFM, which considers itself better protected by the 1932 statute. See 80 Cong. Rec. 9989 (1936); International Musician 9 (June 1937).

[81] 60 Stat. 89 (1946), 47 U.S.C.A. § 506 (Supp., 1947).

[82] "As used in this section the term 'licensee' includes the owner or owners, and the person or persons having control or management, of the radio station in respect of which a station license was granted." 47 U.S.C.A. § 506(e) (Supp., 1947).

Since many of these amateur musicians are minors, the AFM has championed child labor laws broad enough to cover the theater as well as the factory and the mine, has provided in its By-Laws for the disciplining of a member whose child "after being duly notified, and requested to refrain from so doing, persists and continues to compete with members of the Local,"[83] has directed its members who are teachers of school bands not to appear in public with those bands "if such bands compete with members of the American Federation of Musicians," and has decided that in cases where school bands "make serious inroads upon the employment opportunities of members, a Local may prohibit its members from teaching such bands."[84] It has fulminated against the public appearances of Indian bands, police bands,[85] letter-carriers' bands, and bands organized by fraternal organizations. It has amended its By-Laws to make students of "colleges, music schools, universities or similar institutions . . . eligible for membership in the jurisdiction wherein the institute which they attend is located"[86] and to authorize its Executive Board to grant membership to musicians under 16 years of age where the Board "finds it advisable."[87]

Because of its strength and, in the case of school bands, because it commands the allegiance of many of the teachers,[88] the AFM has been able to stop most of the amateur performances which it has found objectionable—thereby preventing a probably infinitesimal reduction of employment opportunities for its members and, at the same time, provoking an inestimable amount of ill-will toward itself.

The climax in this ill-conceived policy toward amateurs came in 1942 when the AFM forced the NBC network to discontinue its annual sustaining broadcasts of a series of concerts by the University of Michigan's National Music Camp. Congressional hearings on bills introduced to pro-

[83] AFM By-Laws Art. IX, § 37 (1947).

[84] International Musician 14 (Supp., June 1909). The By-Laws now provide that: "The right of a member of the Federation to teach a non-union band or orchestra (amateur or otherwise) or to conduct or perform with it at any time or place, is always subject to the orders of the Executive Board of the Local." AFM By-Laws Art. X, § 7-G (1947).

[85] One enthusiastic but ill-advised member of the New York Local brought a taxpayer's suit to restrain the New York City Police Band from performing in competition with professional musicians. Goebel v. Bolan, 150 N.Y. Misc. 574, 268 N.Y. Supp. 501 (1933).

[86] AFM By-Laws Art. X, § 7-D (1947). Other applicants must apply to the Local in whose jurisdiction they reside. Ibid., Art. IX, § 3.

[87] Ibid., Art. IX, § 15.

[88] The AFM does not claim jurisdiction over music teachers as such, but many teachers seek to supplement their income by outside engagements as instrumentalists and have therefor become union members.

hibit such interference with student broadcasts[89] ran far afield to consider a number of other AFM practices in the broadcasting industry, and finally culminated in the Lea Act outlawing most of those other practices in addition to providing:

> (a) It shall be unlawful, by the use or express or implied threat of the use of force, violence, intimidation, or duress, or by the use or express or implied threat of the use of other means, to coerce, compel or constrain or attempt to coerce, compel, or constrain a licensee . . .
>
> (5) to refrain, or agree to refrain, from broadcasting or from permitting the broadcasting of a noncommercial educational or cultural program in connection with which the participants receive no money or other thing of value for their services, other than their actual expenses, and such licensee neither pays nor gives any money or other thing of value for the privilege of broadcasting such program nor receives any money or other thing of value on account of the broadcasting of such program.

Despite this statute, the National Music Camp has not been able to secure another network broadcast.[90] Although no charges have been filed against the AFM on this point, the Camp has found the networks reluctant to resume the student programs.[91]

Apart from the statute, and as a result of hearings conducted last year before a House Subcommittee,[92] the AFM has entered an agreement with the Music Educators National Conference and the American Association of School Administrators wherein the union has waived objections to student performances at school functions, on educational broadcasts, and on certain other occasions where the performances do not bring students into competition with local professional musicians.[93]

FEATHERBEDDING PRACTICES

Quota rules.—The 1903 convention of the AFM, casting about for new means of providing employment, added to the national By-Laws a provi-

[89] Hearings before Subcommittee of Committee on Interstate Commerce on S. 1957, 78th Cong. 2d Sess. (1944) (unpublished); Hearings, op. cit. supra note 75.

[90] The Camp has also been deprived of the teaching services of all AFM members. The Federation placed it on the unfair list soon after its director, Joseph E. Maddy, appeared to testify before a Senate committee. When Maddy continued to teach at the Camp, he was expelled from the union.

[91] Hearings before Committee on Education and Labor on Restrictive Practices of the American Federation of Musicians, 80th Cong. 2d Sess., at 242, 251 (1948); Letter from Joseph E. Maddy, February 2, 1948.

[92] Hearings, op. cit. supra note 68, at 246.

[93] Hearings, op. cit. supra note 91, at 363–65. This agreement was engineered by Representative Carroll D. Kearns, chairman of the Subcommittee, former music teacher, and AFM member. In a second agreement secured by Representative Kearns, the Federation waived objections to the making of recordings solely for educational use by military bands. H.R. Rep. 1162, 80th Cong. 1st Sess. (1947).

sion authorizing each Local to "place in its constitution or by-laws a clause specifying the minimum number of men who shall be allowed to play in the theater orchestras within the jurisdiction of said Local," and a number of the Locals immediately exercised this authority. But the Locals which have enforced such rules do so solely by virtue of their strength and not by means of persuasion. No union practice is more strongly opposed by the employers, and in several instances the Locals' insistence upon observance of such rules has resulted in prolonged strikes and lockouts.

Even the President of the AFM was not sure that this practice was a wise one, and in 1911 he urged the national convention to abandon it.[94] But the convention refused to follow this advice, and the best President Weber could get was an additional provision that if any Local was, in the opinion of the national Executive Board, unable to enforce its minimum-orchestra rule, the Board could step in and "adjust the matter." With that modification, and with a subsequent amendment to make it applicable not only to theaters but to "engagements of any kind," the minimum-orchestra provision remains in the national By-Laws[95] and minimum-orchestra rules are maintained by all Locals strong enough to enforce them.[96]

Moreover, the Federation itself has in recent years adopted similar quota requirements in those areas where negotiation of the details of employment is conducted on a national level. During the period 1938–40 when the employment of staff musicians at radio stations was covered by national agreements, those agreements specified a minimum amount of money which the stations were required to spend annually for the employment of musicians. And the current contracts between the Federation and the movie producers specify minimum numbers of musicians to be employed in studio orchestras.[97]

Attempts to enforce quota rules have several times involved the Locals in litigation, with varying results. One factor militating against accept-

[94] International Musician 2 (Supp., June 1911).

[95] AFM By-Laws Art IX, § 4 (1947).

[96] Thus, the Chicago Local requires a minimum of 8 men for orchestras in legitimate theaters and 18 men for musical shows, Hearings, op. cit. supra note 68, at 293–303; the New York Local requires from 8 to 10 men for orchestras in each of the ballrooms in the city, AFM Local 802, Price List Governing Single and Steady Engagements 7–8 (1947); the Los Angeles Local fixes a separate minimum for each theater and restaurant in its jurisdiction, Hearings, op. cit. supra note 68, at 25–28; and many of the Locals have minimum requirements as to the number of staff musicians to be employed in radio stations. Ibid., at 193.

[97] Each of the 8 major producers is to employ from 36 to 50 musicians, the Society of Independent Motion Micture Producers (comprising some 25 smaller companies) is to employ 104 musicians, and the Independent Motion Picture Producers' Association (comprising some 33 producers of westerns and "action" pictures) is to employ 20 musicians. New York Times, p. 1 (April 27, 1946); Hearings, op. cit. supra note 68, at 76–77, 190, 234.

ance of President Weber's 1911 recommendation was the decision of a Minnesota trial court dismissing an action brought by theater operators to enjoin the Minneapolis Local from striking to enforce its minimum-orchestra rule. That decision was affirmed by the Minnesota Supreme Court the following year, the court being unable to find anything illegal in the refusal of the musicians to work for anyone, at least where that refusal was motivated not by "malice" but by an attempt to advance their own interests.[98] A few years later, the Massachusetts court granted an injunction in a similar situation. It was willing to concede that the theater operator's "right to that free flow of labor to which every member of the community is entitled for the purpose of carrying on business" was limited by "the right of employees to combine for purposes which in the eye of the law justify interference with" the operator's right. But the Massachusetts orb could detect no justification where the purpose of the interference was to compel the operator to give the musicians "work which the plaintiff does not want done" even though that interference was also for the "indirect purpose of enabling the union musicians to earn more money."[99] When a Butte motion picture operator sought an injunction against picketing conducted to enforce quota rules it provided the Montana Court with an opportunity to anticipate the Supreme Court of the United States by twenty-three years[100] in holding picketing a form of free speech protected by the state constitution.[101] Seattle operators were more successful; the Washington court was committed to the doctrine that all picketing was illegal, regardless of its purpose, when carried on within 100 feet of the employer's place of business.[102] More recently, an attempt by a radio station operator to invoke wartime measures failed when the New York Regional War Labor Board ruled that, regardless of the merits of the quota device, it had no authority to set aside "rules which are firmly rooted in collective bargaining relations."[103]

That there are not more instances of litigation of this matter may be explained by the ultimate outcome of the dispute considered in *Lafayette Dramatic Productions, Inc. v. Ferents.*[104] There, the plaintiff had in 1941

[98] Scott-Stafford Opera House Co. v. Minneapolis Musicians' Ass'n, 118 Minn. 410, 136 N.W. 1092 (1912).

[99] Haverhill Strand Theater, Inc. v. Gillen, 229 Mass. 413, 118 N.E. 671 (1918).

[100] Thornhill v. Alabama, 310 U.S. 88 (1940).

[101] Empire Theater Co. v. Cloke, 53 Mont. 183, 163 Pac. 107 (1917).

[102] Danz v. AFM Local 76, 133 Wash. 186, 233 Pac. 630 (1925); Sterling Chain Theaters v. Central Labor Council of Seattle, 155 Wash. 217, 283 Pac. 1081 (1930).

[103] In re Radio Station WOV, 22 War Lab. Rep. 744 (1945).

[104] 305 Mich. 193, 9 N.W. 2d 57 (1943).

opened a theater in Detroit for the presentation of dramas and comedies. Several weeks prior to the opening, the plaintiff's manager had been advised by AFM Local 5 that its rules required him to employ a six-man orchestra, but had refused to comply with the rule, informing the Local that he would not need an orchestra at all. However, when officials of Local 5 and of the stagehands' Local had confronted him two hours before curtain time on the opening night and informed him that if he did not sign a season contract for a six-man orchestra the stagehands would strike, he had signed the contract. On this showing, the Michigan court concluded that the attempt to compel plaintiff to employ musicians it did not want was not a legitimate labor objective, hence that interference with the plaintiff's operations was not justified, had issued an injunction against both unions, and had ordered cancellation of the contract with the musicians—a clear legal victory for the theater operator. But, according to the manager's subsequent testimony before a congressional committee, that decision is rather misleading. He told the committee that soon after the decision came down he received a call from the United Booking Office informing him that it would be unable to book shows for his theater unless he rehired the musicians, and that he is currently employing a six-man orchestra.[105]

It may still be true that these quota requirements in some instances "give evidence rather of the musician's longing to produce artistic music than of his policy to make work" and that they are enforced "to counteract the managers' view that the American musician, like the American mechanic, should turn out more work than his European competitors."[106] But it is even more clearly true that in most cases they are make-work devices and nothing more. Certainly there is no other explanation for a quota rule which is applied, as in the *Lafayette* case, not merely to require the employer to augment his orchestra, but to require him to hire an orchestra where he had none before.

Standby demands.—The "standby" technique—which has been more extensively used by the musicians than by any other group of organized labor outside of the construction and transportation industries—is a creature of many forms. Originally, as used by the AFM, it meant that the employer, in order to placate union objections to performances by nonunion musicians, actually hired a certain number of union members to do nothing but stand by while the performance went on. But since the union musicians performed no services, the employer was not disposed to com-

[105] Hearings, op. cit. supra note 68, at 220–21.

[106] Commons, op. cit. supra note 2, at 442.

plain if they departed before the end of the performance, or if they failed to appear at all. And when the custom had developed to this extent, it was frequently arranged to have the employer pay the agreed number of salaries directly into the Local's unemployment fund rather than to the individual musicians. Thus the "standby" has gradually been transformed from a live musician to a bookkeeping device used to calculate the amount of payment to be made by the employer to the union.

True, the process of evolution is not complete, and some of the Locals still designate specific members to do the standing by, or at least to receive the employer's payments. Moreover, the standby practiced in its most sophisticated form had to be dressed up a bit to take advantage of the Supreme Court's decision that it did not fall within the prohibitions of the Copeland Anti-Racketeering Act of 1934 as long as there was a bona fide offer of services.[107]

In any event, the Federation has scrupulously avoided any public declaration of policy on the matter. While many of its Locals have traditionally demanded standby arrangements whenever amateur musicians perform, or mechanical music is used, or traveling bands are engaged, or motion pictures are shown in theaters where an orchestra is customarily employed, there is no provision in the national Constitution or By-Laws either forbidding or authorizing such practices. Although the national officers are reported to disapprove the Locals' standby demands but to feel themselves powerless to interfere,[108] the practice is defended in the Federation's official journal[109] while the Federation's President is assuring a Congressional Committee that there will be "no more standby."[110] And the national organization has only recently abandoned its demand that standbys be employed whenever a musical performance is broadcast simultaneously over AM and FM stations.

Obviously, no clear line of demarcation can be drawn between those cases where the union demands standby payments and those where, under quota rules, it demands that the employer hire musicians he does not want. In the latter case the surplus musicians may also become standbys if the employer decides to pay their salaries but to dispense with their services. In either form, the standby technique reveals a considerable degree of ineptitude on the part of the union leadership. Whatever may be their ultimate purpose, demands couched in "standby" terminology reach the public simply as demands that musicians be paid for doing nothing—

[107] U.S. v. Local 807 of International Brotherhood of Teamsters, 315 U.S. 521 (1942).

[108] Variety, p. 53 (October 29, 1947).

[109] International Musician 6 (January 1948). [110] Hearings, op. cit. supra note 91, at 353.

extortionate claims which cannot be justified. In a different context, however, many of the union's objectives could be made more palatable. Thus, there is nothing indefensible about the position that members of a theater house orchestra hired by the season should not lose a day's pay every time the theater manager decides to run a motion picture or to bring in a traveling band. Nor is it completely unreasonable to take the position that an orchestra which supplies music for both AM and FM outlets should receive more pay than the orchestra which performs only for an AM broadcast. Even if the union contends that the manager who reduces his expenditures for music by using mechanical devices or amateur performers should make some contribution to the union's unemployment fund, that contention is not nearly as outrageous as a demand that the employer pay salaries to musicians who never unpack their instruments.

But the union has persisted in its standby demands, and congressmen have been outraged. As a consequence, the Lea Act provides:

> (a) It shall be unlawful, by the use or express or implied threat of the use of force, violence, intimidation, or duress, or by the use or express or implied threat of the use of other means, to coerce, compel or constrain or attempt to coerce, compel or constrain a licensee—
>
> (1) To employ or agree to employ, in connection with the conduct of the broadcasting business of such licensee, any person or persons in excess of the number needed by such licensee to perform actual services; or
>
> (2) to pay or give or agree to pay or give any money or other thing of value in lieu of giving, or on account of failure to give, employment to any person or persons, in connection with the conduct of the broadcasting business of such licensee, in excess of the number of employees needed by such licensee to perform actual services; or
>
> (3) to pay or agree to pay more than once for services performed in connection with the conduct of the broadcasting business of such licensee; or
>
> (4) to pay or give or agree to pay or give any money or other thing of value for services, in connection with the conduct of the broadcasting business of such licensee, which are not to be performed. . . .

These statutory provisions are broad enough to cover not only a flat standby demand but also many of the AFM's quota requirements, and the union selected one of the latter to test the constitutionality of the statute, in a dispute avowedly created for that purpose. Chicago radio station WAAF, which devotes 90% of its musical time to recorded and transcribed music, employed three members of AFM Local 10, the individual employment contracts specifying that one was a "platter-turner,"[111] an-

[111] A "platter-turner" is not a disc jockey. In distinct contrast to the disc jockey, he is a silent performer. He operates the transcription-playing equipment and in the larger studios he also operates the record-playing equipment on the disc jockey's program. Disc jockeys, whether they turn their own records or not, are classified as announcers and come within the jurisdiction of the American Federation of Radio Artists (AFL).

other a platter-turner and pianist, and the third a record librarian, although all three actually performed services only as record librarians. As President of Local 10, Petrillo served written demand on WAAF that it employ three staff musicians and that the platter-turners be confined exclusively to such work. When the station failed to comply with this demand, the three members already employed were called out on strike and a picket was placed in front of the station.

An information outlining the above facts, alleging that Petrillo had acted "knowing that [WAAF] had no need for the services of additional employees," and charging him with a violation of subsection (a)(1) of the Lea Act was filed in the Federal District Court in Chicago.[112] But when the defendant moved to dismiss the information, District Judge LaBuy granted the motion on the ground that the statute was unconstitutional in four respects: 1) The phrase "in excess of the number of employees needed" was too vague to satisfy due process requirements for criminal statutes; 2) in limiting the Act to employees of radio stations, Congress had set up an arbitrary classification which violated due process; 3) insofar as the Act limited the right to strike it violated the Fifth and Thirteenth Amendments; and 4) in so far as the Act imposed limitations on peaceful picketing it violated the First Amendment.

The Supreme Court, considering the case on direct appeal,[113] found points 3) and 4) of the District Court's decision not properly before it[114] and point 2) of little substance.[115] As for point 1), a majority of the Court[116] did not share Judge LaBuy's view that the Act imposed upon the defendant an unconstitutional burden of knowledge which only the employer could possess: "The language . . . conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice." Accordingly, the case was remanded for trial, leaving for later decision questions as to whether the Act could constitutionally be applied to limit the right to strike or to picket.

One of these questions dropped from the case when the government filed

[112] Criminal penalties are prescribed in subsection (d) of the Lea Act for "Whoever willfully violates any provision of subsection (a) or (b) of this section. . . ." 47 U.S.C.A. § 506(d) (Supp., 1947).

[113] U.S. v. Petrillo, 332 U.S. 1 (1947).

[114] Both because the motion to dismiss was based solely on the ground that the statute was unconstitutional on its face and because review of cases appealed under the Criminal Appeals Act is limited to questions presented on the face of the statute.

[115] "[I]t is not within our province to say that, because Congress has prohibited some practices within its power to prohibit, it must prohibit all within its power." United States v. Petrillo, 332 U.S. 1, 8 (1947).

[116] Justices Reed, Murphy, and Rutledge dissented on this point. Justice Douglas did not participate in the decision.

an amended information omitting any reference to picketing. And after trial on the amended information, wherein defendant waived jury, the second question also disappeared when Judge LaBuy delivered a judgment of acquittal on the ground that the government had failed to prove an essential element of its case. Although the Judge found that station WAAF did not need the three additional musicians whose employment the defendant demanded, he also found that there was "no evidence whatever in the record to show that defendant had knowledge of or was informed of the lack of need for additional employees prior to the trial of this case."[117]

This decision has been widely described by the press as marking the "death of the Lea Act," but it hardly has that much significance. True, it is not clear just what the government could do to strengthen its proof of defendant's knowledge except to have the station operator expressly inform him that the station does not need more employees, and that would merely make explicit what was implicit in the refusal to hire in the WAAF case, but a jury or a different judge might well reach a contrary conclusion on the evidence presented in that case. The maximum significance of Judge LaBuy's decision, then, is that the provision of the Lea Act involved is dead where Judge LaBuy sits, at least until the Seventh Circuit Court of Appeals or the Supreme Court gets an opportunity to rule on a similar question in another case, and that it may discourage the bringing of similar cases under the Lea Act.

More likely to discourage resort to the Lea Act in such cases, however, is the fact that Congress has now made available another procedure, not confined to the broadcasting industry, wherein the government does not carry as great a burden of proof as in a criminal case.[118] Section 8(b)(6) of the Taft-Hartley Act[119] makes it an unfair labor practice, subject to cease and desist order of the National Labor Relations Board, for a union:

> to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value in the nature of an exaction for services which are not performed or not to be performed.

Obviously, the interpretation of this statute will not be free from difficulty either. In applying it to a situation like that presented in the WAAF case, will it be necessary to prove that the union knew that serv-

[117] United States v. Petrillo, 75 F. Supp. 176, 181 (Ill., 1948).

[118] The Congress which passed the Lea Act also created another possible avenue of criminal prosecution by amending the Anti-Racketeering Act to eliminate the exceptions for bona fide wage claims and for labor union activities upon which the decision in United States v. Local 807 of International Brotherhood of Teamsters, 315 U.S. 521 (1942), discussed in text at note 107 supra, was based. 60 Stat. 420 (1946), 18 U.S.C.A. § 420(a) et seq. (Supp., 1947).

[119] 61 Stat. 140 (1947), 29 U.S.C.A. § 158(b)(6) (Supp., 1947).

ices were "not to be performed" by additional employees whose hiring it demanded? If the employer seeks to circumvent that problem by agreeing to accept the employees, but then gives them no work to do and refuses to pay them, can the union take action to compel him to pay the employers for services which "are not performed" and rely upon the employment agreements as a defense to an unfair labor practice charge? There is little profit in speculating about the answers to such questions, but the very fact that they arise indicates that those radio station and theater operators who have already discharged surplus musicians in reliance upon the Taft-Hartley Act may be overly optimistic.[120]†

[120] Charges recently filed against AFM Local 400, based on its demand for standbys when traveling orchestras appear in the theaters of Hartford, Connecticut, may provide the first test for this section if the federal commerce power reaches such a situation. Variety, p. 46 (April 28, 1948).

† The second part of this article will appear in the Winter issue.

THE VOID ORDER AND THE DUTY TO OBEY*

HUGH B. COX†

IT IS familiar law that the duty of a litigant to obey a temporary restraining order or a temporary injunction does not always depend upon the validity of the court's command. Even though the order or injunction may ultimately be held erroneous by the courts, the order or injunction may be entitled to obedience until it is reversed or set aside on appeal, and disobedience of its provisions in the interim may be punished in a proceeding for criminal contempt.[1]

In what circumstances does an invalid order or temporary injunction issued by a federal court possess this kind of vitality pendente lite?[2] Discussion of this question may well begin by reference to the general principle that courts and commentators have sometimes said is applicable. This principle distinguishes between restraining orders and injunctions that are void because made without jurisdiction, on the one hand, and orders and injunctions that are merely improvident, irregular, or erroneous, on the other. If the court issuing the restraining order or injunction does not have jurisdiction, the order or injunction is said to be void, and to be a nullity; it may be disregarded with impunity.[3] But if the court has jurisdiction over the persons of the litigants and of the subject matter of the litigation, the restraining order or injunction, no matter how improvident or erroneous it may be, must be obeyed until reversed on appeal, and

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[1] Because a proceeding for civil contempt is remedial in its nature there can be no liability for civil contempt if the injunction violated is ultimately held to have been erroneously issued. United States v. United Mine Workers, 330 U.S. 258, 295 (1947); Worden v. Searls, 121 U.S. 14 (1887); Salvage Process Corp. v. Acme Tank Cleaning Process Corp., 86 F. 2d 727 (C.C.A. 2d, 1936); cf. Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911).

[2] The discussion in this article is confined to the decisions of the federal courts. The few decisions by state courts which are cited are merely illustrative of certain points.

[3] In re Sawyer, 124 U.S. 200, 220 (1888); In re Ayres, 123 U.S. 443, 485–86 (1887); Ex parte Fisk, 113 U.S. 713, 718 (1885); Ex parte Rowland, 104 U.S. 604, 612 (1881); see Ex parte Young, 209 U.S. 123, 143 (1908); 2 High, Injunctions § 1425 (4th ed., 1905); Moskovitz, Contempt of Injunctions, Civil and Criminal, 43 Col. L. Rev. 780, 782 (1943); Cook, The Powers of a Court of Equity, 15 Col. L. Rev. 106–7 (1915); Liability of Lawyer for Advising Disobedience, 39 Col. L. Rev. 433–47 (1939). For a discussion of the distinction in terms of judgments generally, see Black, Law of Judgments §§ 170, 240, 278 (2d ed., 1902).

the litigant who disobeys the order may be punished for contempt.[4] The federal courts that have stated this principle have done so without reference to the language of Section 268 of the Judicial Code,[5] the statutory source of the power of the federal courts to punish for contempt. Since 1831 that statute has provided that the authority of the federal courts to punish those who disobey or resist orders of the courts shall extend only to disobedience or resistance "to any lawful writ, process, order, rule decree or command." To reconcile the principle with the statute, it is necessary to conclude that a restraining order or an injunction, even though ultimately held invalid, is nevertheless "lawful" within the meaning of the statutory language until reversed, provided that the order or the injunction has been issued by a court that has jurisdiction of the person and of the subject matter.[6]

Because this principle tests the duty to obey by a reference to the question of whether the court issuing the command has jurisdiction, the application of the principle to a particular situation will necessarily require a decision of that question. The question of whether a court has jurisdiction is one that has arisen in the federal courts in a variety of cases; and the variations in the cases presenting the question have frequently led to differences both in the purposes and in the consequences of the decisions. Under these circumstances, it is hardly surprising to find that "jurisdiction" is a word to which the courts have given various shades of meaning.[7] Since any attempt to discuss all aspects of the concept of jurisdiction would extend this article beyond reasonable limits, questions relating to jurisdiction over the person will be put aside and the discussion confined to the concept of jurisdiction of the subject matter.

A court is said to have jurisdiction of the subject matter of a particular controversy if the court has authority to hear and decide causes of a class

[4] Howat v. Kansas, 258 U.S. 181, 189–90 (1922); Elliot v. Peirsol, 1 Pet. (U.S.) 328 (1828); Western Fruit Growers v. Gotfried, 136 F. 2d 98, 100 (C.C.A. 9th, 1943); Locke v. United States, 75 F. 2d 157, 159 (C.C.A. 5th, 1935); Brougham v. Oceanic Steam Navigation Co., 205 Fed. 857 (C.C.A. 2d, 1913). For an early discussion of the distinction between injunctions which are merely erroneous and those which are void for lack of jurisdiction, see People ex rel. Davis v. Sturtevant, 9 N.Y. 263 (1853).

[5] 36 Stat. 1163 (1911), 28 U.S.C.A. § 385 (1928).

[6] See the comment of Justice Rutledge, dissenting in United States v. United Mine Workers, 330 U.S. 258, 361 (1947).

[7] For comment on the different meanings which are sometimes given to the word "jurisdiction," particularly as applied to the subject matter of litigation, see Stoll v. Gottlieb, 305 U.S. 165, 176 (1938); In re Labor Board, 304 U.S. 468, 494 (1938); Massachusetts State Grange v. Benton, 272 U.S. 525, 528 (1926); Binderup v. Pathé Exchange, 263 U.S. 291, 305 (1923); Illinois Central R. Co. v. Adams, 180 U.S. 28, 38 (1901); Moran v. Moran, 160 F. 2d 925, 926–27 (App. D.C., 1947); In re Stuart, 114 F. 2d 825, 833 (App. D.C., 1940); Amey v. Colebrook Guaranty Savings Bank, 92 F. 2d 62, 63 (C.C.A. 2d, 1937).

to which the particular controversy belongs.[8] In defining jurisdiction of the subject matter in these terms, the courts have emphasized that the jurisdiction of a court depends upon its right to decide the case and not upon the merits of its decision.[9]

The basic authority of the federal courts to hear and to decide controversies comes from the provisions of the Constitution that define the judicial power.[10] Within the limits fixed by the constitutional provisions, the jurisdiction of the federal courts has been further limited and defined by acts of Congress. In the exercise of its constitutional powers Congress has established the inferior federal courts, defined their territorial jurisdiction, and specified the classes or kinds of controversies that these inferior courts are authorized to decide.[11] In some instances Congress has directed that only inferior federal courts of a particular composition may decide particular kinds of controversies.[12] Under the Constitution, Congress also has the authority to enact regulations governing the appellate jurisdiction of the Supreme Court, and in the exercise of this authority it has specified the categories of controversies in which that appellate power may be exercised. The constitutional provisions and the statutes mentioned in this paragraph impose limitations upon the courts that are truly jurisdictional in character; that is to say, they are limitations upon the power of the courts to decide particular kinds of controversies.

But in addition to the statutes creating the inferior federal courts and defining the kinds of controversies that those courts are authorized to decide, there are numerous other statutes that control or limit in one way or another the conduct of the lower federal courts in deciding cases. These statutes differ widely in their scope, their language, and their purpose. In most instances the limitations imposed by these statutes are not truly ju-

[8] See Cooper v. Reynolds, 10 Wall. (U.S.) 308, 316 (1870); Grignon's Lessee v. Astor, 2 How. (U.S.) 319 (1844); Rhode Island v. Massachusetts, 12 Pet. (U.S.) 657 (1838); Brougham v. Oceanic Steam Navigation Co., 205 Fed. 857, 860 (C.C.A. 2d, 1913); Hunt v. Hunt, 72 N.Y. 217, 229 (1878); People ex rel. Davis v. Sturtevant, 9 N.Y. 263 (1853).

[9] Ex parte Watkins, 7 Pet. (U.S.) 568, 572 (1833); Brougham v. Oceanic Steam Navigation Co., 205 Fed. 857, 860 (C.C.A. 2d, 1913); United States v. Ass'n of American Railroads, 4 F.R.D. 510, 517–18 (Neb., 1945); Hunt v. Hunt, 72 N.Y. 217, 229 (1878); People ex rel. Davis v. Sturtevant, 9 N.Y. 263 (1853).

[10] U.S. Const. Art. III; U.S. Const. Amend. 11.

[11] Section 24 of the Judicial Code, 36 Stat. 1091 (1911), 28 U.S.C.A. § 41 (1927), is a familiar example of a statute which defines controversies that the lower federal courts are authorized to decide.

[12] For example, 38 Stat. 220 (1913), 28 U.S.C.A. § 47 (1927), provides that any suit to suspend or set aside an order of the Interestate Commerce Commission must be heard and decided by a specially convened District Court composed of three judges, "of whom at least one shall be a Circuit Judge." See also the Act of August 24, 1937, 50 Stat. 752 (1937), 28 U.S.C.A. § 380a (Supp., 1947).

risdictional in character; the limitations do not deprive the courts of authority to decide the subject matter of particular controversies, but prescribe a rule of conduct that the courts are directed to follow in deciding controversies that fall within their jurisdiction. To use the language of Mr. Justice Holmes in *Burnet v. Desmornes*,[13] these statutes do not "affect the power of the court," but merely "fix the law by which the court should decide." This distinction between statutory limitations that are truly jurisdictional and those that are not is clear enough in the abstract, but it is not always easy to decide into which category a particular limitation should fall.

In the earlier cases in which the federal courts considered whether an order was void and therefore need not be obeyed, the courts adopted this distinction between truly jurisdictional limitations of judicial authority and limitations that control the conduct of a court but do not define its jurisdiction. But although the courts explained their decisions in terms of the distinction, an examination of their decisions suggests that whatever merit this distinction may have in the abstract, it is not always satisfactory in practice. It is apparent that to preserve the distinction and at the same time to achieve results thought to be equitable, courts have sometimes found it necessary to give the concept of jurisdiction of subject matter a meaning inconsistent with the definition that the same courts have framed at other times and for other purposes.

Discussion of these decisions may well begin with two cases in which the Supreme Court held judicial orders void because of infirmities that were truly jurisdictional. In the first of these cases, *In re Ayers*,[14] a bill in equity was filed in the Circuit Court of the United States for the Eastern District of Virginia by persons who had bought tax receivable coupons cut from bonds of the State of Virginia. The purpose of the bill was to enjoin Ayers, who was Attorney General of Virginia, and certain other State officers, from prosecuting suits in the name of the State against delinquent taxpayers who tendered the tax receivable coupons in payment of taxes. The Circuit Court issued a restraining order that prohibited the defendants from instituting such proceedings. After the defendants violated the order, Ayers was prosecuted and convicted of contempt.[15]

[13] 226 U.S. 145, 147 (1912).

[14] 123 U.S. 443 (1887).

[15] In Carter v. United States, 135 F. 2d 858, 861 (C.C.A. 5th, 1943), it was suggested that the proceeding in In re Ayers was for civil contempt. It is difficult to accept this suggestion. Ayers was fined $500 for his contempt and committed to the custody of the marshal until he paid the fine and purged himself of the contempt by dismissing the proceedings in the state court which was alleged to have constituted the contempt. The fine was imposed in absolute terms and appears to have been punitive in character. 123 U.S. 443, 457 (1887).

The Supreme Court held that the suit was, in fact, a suit against the State and therefore within the scope of the Eleventh Amendment, so that the lower court had lacked jurisdiction. As a result, the restraining order issued by the lower court was declared a nullity, and Ayers was ordered released on a writ of habeas corpus. It is difficult to quarrel with the view that the limitations imposed by the Eleventh Amendment are jurisdictional in character.[16] Curiously enough, however, for other purposes the Supreme Court has refused to regard problems arising under the Eleventh Amendment as jurisdictional questions. For example, in *Illinois Central Railroad Company v. Adams*,[17] the Court dealt with a problem of pleading and practice[18] by stating, "The question whether this is a suit against the State within the Eleventh Amendment to the Constitution . . . is also one which we think belongs to the merits rather than to the jurisdiction."

In re Burrus[19] furnishes another example of an order correctly held void because made by a court having no jurisdiction of the subject matter. In that case the Supreme Court decided that in the absence of any of the statutory grounds of federal jurisdiction, a United States district court had no jurisdiction of a suit brought to obtain the custody of a child. Accordingly, an order awarding custody of a child, issued by a district court in such a suit, was held void, and the lower court was declared powerless to punish disobedience of the order in criminal contempt proceedings.[20]

In both the *Ayers* and *Burrus* cases the infirmities that the Supreme Court regarded as making the orders void were truly jurisdictional in character. But in other cases in which the Supreme Court has been called upon to decide whether an erroneous order was void the Court seems to have extended the concept of jurisdiction of the subject matter into areas where the propriety of its application is open to question.

[16] In Ex parte Young, 209 U.S. 123, 142, 149 (1908), the Supreme Court regarded the application of the Eleventh Amendment as raising a jurisdictional question.

[17] 180 U.S. 28, 37 (1901).

[18] The particular point under consideration in this case was whether the question of the application of the Eleventh Amendment could properly be raised by a motion to dismiss. The Court held that such a motion was not the proper way to raise the defense, at least in a case where the suit was brought against an individual and not against the state eo nomine. The Supreme Court has also held that the immunity from suit conferred upon a state by the Eleventh Amendment may be waived by the state. Gunter v. Atlantic Coast Line R. Co., 200 U.S. 273 (1906); Clark v. Barnard, 108 U.S. 436, 447 (1883). Yet in other contexts the Supreme Court has said that "the lack of jurisdiction of a federal court touching the subject matter of the litigation cannot be waived by the parties. . . ." United States v. Corrick, 298 U.S. 435, 440 (1936).

[19] 136 U.S. 586 (1890).

[20] The petitioner had been committed to jail for contempt of the district court order awarding custody of the child and had petitioned the Supreme Court for a writ of habeas corpus.

In *Ex parte Fisk*,[21] one illustration of this tendency on the part of the Court, Fisk had been sued for fraud in a court of the State of New York. The New York court, acting pursuant to the provisions of the New York Code of Civil Procedure, had ordered Fisk to permit his testimony and deposition to be taken by the party before trial. Before the examination was completed, Fisk removed the case to the Circuit Court of the United States. That court issued an order requiring Fisk to appear and to continue the examination which had been started in the state court. Fisk refused. He was held in contempt, fined $500, and committed to the custody of the marshal until the fine was paid.[22] Fisk thereupon applied to the Supreme Court for a writ of habeas corpus.

The Supreme Court, after reviewing the provisions of Section 861 of the revised statutes[23] and certain related provisions, concluded that the circuit court did not have the authority under the statutes to order the taking of the defendant's deposition before trial.[24] The Court therefore concluded that the order of the circuit court was made without jurisdiction and was void, so that Fisk should be released from his commitment.

In this case there was no question of jurisdiction over the person of Fisk and no question of the court's jurisdiction over the subject matter of the lawsuit. Indeed, Fisk's removal of the case to the federal court constituted an assertion that the court did have jurisdiction of the subject matter. The point really decided by the Supreme Court was that the circuit court had no authority under the statutes to issue the particular order that Fisk had violated. It seems difficult to escape the conclusion that this point did not touch the power of the circuit court over Fisk's person or its authority to hear the case, but related only to the circuit court's authority to issue a particular kind of interlocutory order.

It is true that the circuit court had erroneously construed the applicable statute and that it had attempted to issue an order that the statutes did not empower it to make. In this sense the court's action was unauthorized. In addition it might be said that the court in this case had not merely erroneously issued an order of a kind that it was authorized to make, but on the contrary that this particular order belonged in a category of

[21] 113 U.S. 713 (1885).

[22] There is no discussion of the point in the case, but it would appear that this was a proceeding for criminal contempt.

[23] Rev. Stat. § 861 (1878), 28 U.S.C.A. § 635 (1928).

[24] Section 861 provided that the mode of proof in the trial of actions at common law should be by oral testimony and examination of witnesses in open court except as otherwise provided. The Supreme Court in its opinion examined the exceptions to this provision and concluded that none of them applied to the case at bar.

orders entirely outside the authority of the court. Even when the point is stated in this way, however, it hardly seems appropriate to regard the lower court's error as jurisdictional. The test of jurisdiction over the subject matter is whether the court can decide the case at all and not whether the court has authority to issue a particular kind of order in the course of deciding the case. It has already been pointed out that statutes place many restrictions upon the action that a federal court may take in deciding the cases to which its authority extends. No serious contention can be made that in every instance in which the court erroneously construes those statutes, its mistake goes to the question of jurisdiction.[25]

In *Ex parte Rowland*,[26] the order of a lower federal court, reviewed by the Supreme Court, similarly appears to have been erroneous but not in excess of jurisdiction in the strict sense. There a petition for a writ of habeas corpus had been brought to secure the discharge of state officials who had been convicted of contempt for failing to comply with a writ of mandamus issued by a lower federal court. The Supreme Court held that the writ of mandamus had been improperly issued because it attempted to compel the officers against whom it was directed to cause a tax to be collected when it was not their legal duty to collect the tax. On that basis, the Court concluded that the order committing the petitioners was void and a nullity and ordered them released. The case illustrates the familiar principle that a writ of mandamus can be issued directly only against a person whose duty it is to do the thing that the parties seek to have done. Thus the situation was one in which the lower court had erred as to the scope of the remedy of mandamus but hardly one in which the court had acted in excess of its jurisdiction. It should be noted that the writ of mandamus was sought in this case as ancillary to a judgment secured in the lower federal court in a case in which that court clearly had jurisdiction.[27]

[25] For example, the Act of October 15, 1914, 38 Stat. 738 (1914), 28 U.S.C.A. § 383 (1928), provides that every injunction or restraining order shall set forth the reasons for its issuance. The Supreme Court has held that disregard of this requirement does not make an interlocutory order void. Lawrence v. St. L.-S.F. Ry. Co., 274 U.S. 588, 592 (1927). Section 265 of the Judicial Code, 36 Stat. 1162 (1911), 28 U.S.C.A. § 379 (1928), provides that except in bankruptcy cases the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state. The Supreme Court has said of this statute in Smith v. Apple, 264 U.S. 274, 278–79 (1924): "It is not a jurisdictional statute. It neither confers jurisdiction upon the district courts nor takes away the jurisdiction otherwise specifically conferred upon them by the federal statutes. It merely limits their general equity powers in respect to the granting of a particular form of equitable relief; that is, it prevents them from granting relief by way of injunction in the cases included within its inhibitions. In short, it goes merely to the question of equity in the particular bill." See also Woodmen of the World v. O'Neill, 266 U.S. 292, 298 (1924).

[26] 104 U.S. 604 (1881).

[27] The contempt involved in the case was apparently a civil contempt, and the soundness of the Supreme Court's decision may be defended on that ground. Compare Beauchamp v.

The tendency of the Supreme Court in the past to expand the concept of jurisdiction when necessary to excuse litigants from the duty of obeying an erroneous order was also apparent in *In re Sawyer*.[28] In that case the Supreme Court held that a lower federal court lacked jurisdiction to entertain a bill in equity to restrain the mayor and certain members of the city council of Lincoln, Nebraska from removing a police judge of the city on charges of malfeasance. The Supreme Court concluded that this absence of jurisdiction rendered the lower court's temporary restraining order void. Consequently, the defendants, who had been convicted of contempt for having violated the restraining order, were discharged upon a writ of habeas corpus.

The jurisdiction of the lower federal court had been invoked on the ground that the defendants' activities violated rights of the plaintiff secured to him by the Constitution of the United States. But the Supreme Court did not hold that the lower court lacked jurisdiction because no substantial constitutional question was involved. Instead, the Court based its conclusion as to the lower court's absence of authority to entertain the litigation primarily on the premise that a court of equity has no jurisdiction over the appointment or removal of public officers, the power to determine title to a public office resting exclusively in the courts of law.[29] In other words, the Supreme Court decided that the cause of action asserted in the lower court was not the type of suit of which the courts of equity historically took cognizance; that is to say, that there was a lack of "equity jurisdiction."

The question raised by the decision in *In re Sawyer* is whether "equity jurisdiction" should be regarded as the kind of jurisdiction whose absence makes an order void. Originally the term "equity jurisdiction" doubtless referred to the category of controversies that a court of equity was au-

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United States, 76 F. 2d 663 (C.C.A. 9th, 1935), where the Court of Appeals for the Ninth Circuit (Judge Wilbur dissenting) held that a person alleged to have disobeyed an order made by a referee in bankruptcy could not be punished for criminal contempt because the order was void. The referee's order was doubtless erroneous, but this too seems to have been a case in which the lower court made an error in its interpretation of the substantive law and not a case in which the court acted in excess of its jurisdiction.

[28] 124 U.S. 200, 212, 220 (1888).

[29] The Court also considered 1) whether the proceedings of the defendants in the case could be regarded as criminal or quasi-criminal in character and 2) whether the defendants' proceedings were to be considered as proceedings in a state court. It concluded that in either event the lower court had no jurisdiction because 1) a court of equity has no authority to enjoin the prosecution or the punishment of crimes, and 2) the Act of March 2, 1793, 1 Stat. 335 (1793), provided that no injunction should be issued by any court of the United States to stay proceedings in any state court except when authorized by a bankruptcy statute. As to the latter point, compare Smith v. Apple, 264 U.S. 274 (1924).

thorized to decide. So long as the principles of equity were administered by separate courts, questions of equity jurisdiction were jurisdictional questions in the strict sense; if the cause of action was not of a kind that fell within the province of the chancellor, a court of equity had no power to decide the cause. But the abolition of the distinction between courts of law and courts of equity and the establishment of a single system of courts authorized to administer both the principles of law and the principles of equity tended to give the term "equity jurisdiction" a somewhat different meaning.[30] In the case of a single court authorized to apply the principles of both law and equity, the statement that there is lack of "equity jurisdiction" does not necessarily mean that the court lacks power to adjudicate the controversy. The statement is usually intended to mean merely that under the historic principles of equity the plaintiff is not entitled to the relief he seeks. Thus, today the concept of equity jurisdiction is one that relates rather to the question of the merits of a controversy than to the basic power of the court to decide the case.[31]

The Supreme Court has made a distinction between questions that affect the power or authority of the federal courts, as federal courts, to decide controversies, on the one hand, and questions of equity jurisdiction, on the other, and has said that questions in the latter category are not truly jurisdictional questions at all. Thus, in commenting on the pro-

[30] Compare Maitland's comment to the effect that after the Judicature Acts of 1873 and 1875 it was no longer possible to regard equity as a body of rules that was administered by any single court. Maitland, Equity 1, 15–16, 20–21 (2d ed., 1936).

[31] See Massachusetts State Grange v. Benton, 272 U.S. 525, 528 (1926), where Justice Holmes, speaking for the Court, said: "Courts sometimes say that there is no jurisdiction in equity when they mean only that equity ought not to give the relief asked. In a strict sense the Court in this case had jurisdiction. It had power to grant an injunction, and if it had granted one its decree, although wrong, would not have been void. But upon the merits we think it too plain to need argument that to grant an injunction upon the allegations of this bill would be to fly in the face of the rule which, as we have said, we think should be very strictly observed." The "rule" referred to by Justice Holmes was the principle that "no injunction ought to issue against officers of a State clothed with authority to enforce the law in question, unless in a case reasonably free from doubt and when necessary to prevent great and irreparable injury."

In this regard, compare Pomeroy, Equity §§ 129, 131 (5th ed., 1941); see also Cook, The Powers of a Court of Equity, 15 Col. L. Rev. 106–7 (1915): "In its strict and proper sense 'jurisdiction' so far as it relates to courts, means power to take valid action which will be binding on the parties until set aside or reversed by some competent tribunal. In the equity cases, however, in many cases all that is meant by the statement 'that equity has no jurisdiction' in a given case, is that equitable relief will not be given by courts of equity, though, if it were given, the decree entered, even if erroneous, would be binding on the parties until some competent tribunal took action to alter it in some way. The difference is an important one for the reason that, if the court had no jurisdiction, i.e., power to make the alleged decree, there is no decree to which any attention need be paid." This passage seems to involve circuity of definition. Cook defines jurisdiction by reference to whether the order made is binding on the parties until reversed or set aside. But he also appears to say that the test of whether the order is binding is whether it is made in the exercise of jurisdiction.

visions of Section 24(1) of the Judicial Code,[32] which provides that in certain circumstances district courts shall have jurisdiction of suits of a civil nature in equity, Chief Justice Stone said in *Atlas Life Insurance Company v. W. I. Southern, Incorporated:*

> The "jurisdiction" thus conferred on the federal courts to entertain suits in equity is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English court of chancery at the time of the separation of the two countries. . . . This clause of the statute does not define the jurisdiction of the district courts as federal courts, in the sense of their power and authority to hear and decide, but prescribes the body of doctrine which is to guide their decisions and enable them to determine whether in any given instance a suit of which a district court had jurisdiction as a federal court is an appropriate one for the exercise of the extraordinary powers of a court of equity.[33]

Again he asserted in *Douglas v. Jeanette*[34] that "want of equity jurisdiction" does not go to the power of the court to decide. In a still earlier case, *Mellen v. Moline Iron Works*,[35] the Court, in dealing with the question of collateral attack and res judicata, declared that an adjudication that a particular case is of equitable cognizance "is not void even if erroneous."

All these statements were made in cases in which the Court was not considering whether an order issued by a lower court that lacked equity jurisdiction was void and need not be obeyed pendente lite.[36] For that

[32] 54 Stat. 143 (1940), 28 U.S.C.A. § 41(1) (Supp., 1947).

[33] 306 U.S. 563, 568 (1939). [34] 319 U.S. 157, 162 (1943).

[35] 131 U.S. 352, 367 (1889); see also Di Giovanni v. Camden Fire Ins. Ass'n, 296 U.S. 64, 69 (1935); Pennsylvania v. Williams, 294 U.S. 176, 181 (1935); Smith v. Apple, 264 U.S. 274, 278 (1924).

[36] For example, in Atlas Life Ins. Co. v. W. I. Southern, Inc., 306 U.S. 563 (1939), a Circuit Court of Appeals had certified questions to the Supreme Court under Section 239 the Judicial Code, 43 Stat. 938 (1925), 28 U.S.C.A. § 346 (1928). The principal issue in the case was whether an insurance company could bring a suit in equity in a federal court for cancellation of insurance policies on the ground of fraud. The case turned ultimately on the question of whether an adequate remedy existed at law in the state courts.

In Douglas v. Jeannette, 319 U.S. 157 (1943), the problem was whether the plaintiffs, Jehovah's Witnesses, could enjoin threatened criminal prosecution for violation of a city ordinance.

In Pennsylvania v. Williams, 294 U.S. 176, 181 (1935), the Supreme Court held that a suit to liquidate an insolvent building and loan association, there being the requisite allegations of diversity of citizenship and jurisdictional amount, was within the jurisdiction of the federal district court. The Court ruled that whether the suit should have been brought by a shareholder of the insolvent corporation rather than a judgment creditor and whether, under state law, the shareholder had creditor status were questions going to the propriety of the action of a court of equity and not to its jurisdiction.

Compare Venner v. Great Northern Ry., 209 U.S. 24 (1908), and Illinois Central R. Co., 180 U.S. 28 (1901) (the issue involved was whether the objection that the plaintiff had not complied with Equity Rule 94 was one going to the jurisdiction of the lower federal court); Blythe v. Hinckley, 173 U.S. 501 (1899) (problem of whether a lower court ruling on the question of the complainant's plain, adequate, and complete remedy at law was a decision on a

reason it may be argued that no matter how explicit the Court's statements may have been, they are not controlling or even persuasive upon the point that is now under discussion. But it is difficult to embrace a conclusion that requires us to give the concept of equity jurisdiction one meaning in one context and quite a different meaning in another; certainly in a discussion of the principle that is to apply to the question whether a litigant is required to obey an invalid restraining order pendente lite we are not required to disregard entirely the meaning which the Supreme Court has given to the term "equity jurisdiction" in the cases cited in the preceding paragraph.

The attitude of the federal courts toward questions of equity jurisdiction is further illustrated by reference to the familiar doctrine that a court of equity will not entertain a suit if the plaintiff has a plain and adequate remedy at law. It seems clear that historically this principle imposed a limitation upon the Court of Chancery that was truly jurisdictional in character; if an adequate remedy existed at law, the court had no authority to hear the case and the suitor was remitted to the courts that had jurisdiction.[37] The principle is embodied in Section 267 of the Judicial Code,[38] which explicitly prohibits any court of the United States from entertaining a suit in equity in any case where a plain, adequate, and complete remedy may be had at law. The Supreme Court has consistently held that this section does not affect the jurisdiction of the federal courts in the sense of affecting their power to decide.[39]

Indeed, it is interesting to note that the opinion of the majority of the Court in *In re Sawyer* recognized that the fact that the plaintiff had an adequate remedy at law would not deprive a court of equity of jurisdiction so as to make its order void. In describing the limits of its holding, the Court said:

> Neither do we say that, in a case belonging to a class or subject which is within the jurisdiction both of courts of equity and of courts of law, a mistake of a court of equity,

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jurisdictional question which could be reviewed by direct appeal to the Supreme Court under the provision of the Judicial Code permitting such appeal in any case in which jurisdiction was in issue); Smith v. McKay, 161 U.S. 355 (1896).

[37] See 1 Spence, The Equitable Jurisdiction of the Court of Chancery 419 (1846): "It was a principle, that if the matter were properly cognizable, and relievable in any established court of ordinary jurisdiction, and no assistance was required from the court to effectuate a fair trial, the parties should be dismissed from the Court of Chancery to a Court of Common Law, or other court of competent jurisdiction. . . ."

[38] 1 Stat. 82 (1789), 28 U.S.C.A. § 384 (1928).

[39] Atlas Life Ins. Co. v. W. I. Southern, Inc., 306 U.S. 563, 570 (1939); Di Giovanni v. Camden Fire Ins. Ass'n, 296 U.S. 64, 69 (1935); Henriette Mills v. Rutherford County, 281 U.S. 121, 128 (1930); cf. Amis v. Meyers, 16 How. (U.S.) 492 (1853).

in deciding that in the particular matter before it there could be no full, adequate and complete remedy at law, will render its decree absolutely void.[40]

This statement, although negative in form, seems to suggest that the Court would have reached an opposite conclusion as to the jurisdiction of the lower court if the only question had been whether there was a full, adequate, and complete remedy at law. Thus the Court's dictum implies the curious conclusion that lack of equity jurisdiction on one ground makes a decree absolutely void, and lack of equity jurisdiction on another ground, equally historic and well recognized in character, does not have that effect. The anomaly disclosed by this analysis is particularly striking in view of the fact that the Court's decision in *In re Sawyer* that the jurisdiction of a court of equity did not extend to controversies involving appointments to or removals from public offices rested at least in part on the ground that "[t]he jurisdiction to determine the title to a public office belongs exclusively to the courts of law, and is exercised either by *certiorari*, error or appeal, or by mandamus, prohibition, *quo warranto*, or information in the nature of a writ of *quo warranto*, according to the circumstances of the case, and the mode of procedure established by the common law or by statute."[41] This statement suggests that the adequacy of the available legal remedies was one reason that courts of equity did not take cognizance of cases involving the title to public office.

In the light of the Supreme Court's declarations in regard to equity jurisdiction in other connections, it seems difficult to escape the conclusion reached by Justice Harlan in his dissent that the Court erred in holding in *In re Sawyer* that lack of equity jurisdiction made the temporary restraining order void.[42]

[40] In re Sawyer, 124 U.S. 200, 221 (1888).

[41] Ibid., at 212.

[42] Justice Harlan argued: "Whether the Circuit Court, sitting *in equity*, could properly grant to the plaintiff the relief asked is not a question of jurisdiction within the rule that orders, judgments, or decrees are void, where the court, which passed them, was without jurisdiction. It is rather a question as to the exercise of jurisdiction." Ibid., at 224. In his dissenting opinion in United States v. United Mine Workers, 330 U.S. 258, 355–56 n. 19, 357 (1947), Justice Rutledge suggested that Justice Harlan had later "receded from" or "retracted" the views he had expressed in In re Sawyer. The passage in Justice Harlan's dissent in Ex parte Young, 209 U.S. 123, 169 (1908), to which Justice Rutledge refers does not seem to be directed to the problem of whether lack of equity jurisdiction makes a temporary injunction void. Justice Harlan's discussion in Ex parte Young centered on whether the suit was one against the state within the meaning of the Eleventh Amendment. Therefore, the prior dissenting opinions to which he referred in the Young case must have been opinions in which the latter question and not that of the lack of equity jurisdiction was before the Court. Doubtless one of the dissenting opinions which Justice Harlan had in mind was his statement in In re Ayers, 123 U.S. 443, 510–16 (1887). There he had dissented on the ground that the suit was not one against the state under the Eleventh Amendment.

The Circuit Court of Appeals for the Fifth Circuit, in Carter v. United States, 135 F. 2d 858,

It may be useful to pause at this point to inquire whether there is any explanation for the Supreme Court's willingness in such cases as *Ex parte Fisk* and *In re Sawyer* to regard infirmities as jurisdictional when the better view would seem to have been that although the orders involved were erroneous, they were not void. It has been suggested that the Court's decisions in these cases were influenced by the fact that when the cases were decided a person convicted of criminal contempt could obtain appellate review only by the writ of habeas corpus.[43] It was well settled at the time of these decisions that the writ of habeas corpus would not be used as a writ of error to review the decisions of lower courts on the merits, but that it would be used only to reach those exercises of authority which were void because in excess of jurisdiction.[44] Consequently, if the Court wished to give the petitioner, in such a case as *Ex parte Fisk* or *In re Sawyer*, any relief whatever, the Court was forced to take the position that the invalidity of the order that had been disobeyed was jurisdictional in character. It is significant that Justice Miller expressly referred to this fact at the very beginning of the Court's opinion in *Ex parte Fisk*. Equally persuasive is the possibility that in the latter case the Court was moved in part by the belief that if Fisk obeyed the erroneous order, his legal interests would be substantially and irrevocably injured; for that reason, the Court may have believed that Fisk was entitled to relief from so patently erroneous an order as the one that the lower court had made.

If there is any merit in the view that these considerations may have influenced the decisions of the Supreme Court, that view suggests that the

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861 (C.C.A. 5th, 1943), took the view that In re Sawyer had been erroneously decided; see also 51 Harv. L. Rev. 747 (1938), noting Reid v. Independent Union of All Workers, 200 Minn. 599, 275 N.W. 300 (1937). But compare the comment of Cook, op. cit. supra note 3, who seems to regard the decision as a true illustration of the difference between lack of primary jurisdiction and equity jurisdiction.

[43] In Carter v. United States, 135 F. 2d 858, 861 (C.C.A. 5th, 1943), this suggestion was made with particular reference to the decision in Ex parte Fisk.

Dissenting in Sunal v. Large, 332 U.S. 174, 185–86 (1947), Justice Frankfurter set forth a classification of the cases in which the federal courts have issued writs of habeas corpus. He placed the Rowland, Ayers, and Sawyer cases in a category headed "Due regard for harmonious Nation-State relations, need to avoid friction and maintain balance." Justice Frankfurter then made this additional comment with respect to these cases: "Availability of other remedies is here an important factor."

For decisions illustrating the history of the development of appellate review of criminal contempt proceedings, see Toledo Newspaper Co. v. United States, 247 U.S. 402 (1917); Bessette v. W. B. Conkey Co., 194 U.S. 324 (1903); In re Chetwood, 165 U.S. 443 (1896).

[44] The rule that a writ of habeas corpus cannot be used as a writ of review, but can be used only to release persons held under orders void because made without jurisdiction, has been substantially modified in the modern decisions. Compare Ex parte Fisk, 113 U.S. 713 (1884), and Ex parte Kearney, 7 Wheat. (U.S.) 37 (1822), with Bowen v. Johnston, 306 U.S. 19 (1938), and Ex parte Hudgings, 249 U.S. 378 (1918).

question whether an order should be obeyed pendente lite is not one that should be decided merely by reference to whether the court issuing the order had jurisdiction.

Another line of decisions in the federal courts appears relevant to the problem now under discussion. The section of the Judicial Code that gives to the federal courts original jurisdiction of suits of a civil nature arising between citizens of different states where $3,000 or more is in controversy imposes limitations truly jurisdictional in character. It might therefore be supposed that an erroneous conclusion either on the question of diversity of citizenship or on the existence of the jurisdictional amount would make any order based on that error void. Despite the seeming logic of this supposition, the fact is that the federal courts have been not at all inclined to press the doctrine of the void order to this conclusion.

One passage in the opinion of the Court in *In re Sawyer* bears directly on this aspect of the problem of jurisdiction:

> We do not rest our conclusion in this case, in any degree, upon the ground, suggested in argument, that the bill does not show a matter in controversy of sufficient pecuniary value to support the jurisdiction of the Circuit Court; because an apparent defect of its jurisdiction in this respect, as in that of citizenship of parties, depending upon an inquiry into facts which might or might not support the jurisdiction, can be availed of only by appeal or writ of error, and does not render its judgment or decree a nullity.[45]

The Court is here speaking of questions of diversity of citizenship and the statutory requirement of $3,000—questions that in the case of a federal court are basically and truly jurisdictional in character. Yet the Court said that if the decision of these questions depended upon a preliminary determination of issues of fact, an erroneous decision on the basic question of jurisdiction would not make the order of the lower court void. Presumably, although the Court is not explicit on this point, in such a case the litigant would be required to obey a restraining order or injunction until it was set aside on appeal. The notion embodied in this passage in the Court's opinion has been described as the doctrine of "jurisdiction to determine jurisdiction."[46]

The above quotation from the opinion in *In re Sawyer* is apparently the first statement of this notion in a decision of the Supreme Court that was directed to the issue of whether a restraining order should be obeyed until reversed or set aside in regular course. But the doctrine had an earlier and respectable history in the decisions of the federal courts dealing with other questions, particularly those of res judicata and collateral attack.

[45] In re Sawyer, 124 U.S. 200, 220–21 (1887).

[46] See Res Judicata and Jurisdiction: The Bootstrap Doctrine, 53 Harv. L. Rev. 652 (1940).

The federal courts at an early date held that a decree in a former suit could not be attacked collaterally on the ground that the court had no jurisdiction because there was no diversity of citizenship. This rule, which was first applied in instances in which the record did not show diversity of citizenship, was subsequently extended to situations in which it affirmatively appeared from the record of the prior proceeding that there was no diversity of citizenship and hence no jurisdiction. In these decisions the federal courts took the position that the court in the prior proceeding had jurisdiction to determine its own jurisdiction and that the exercise of that authority protected the decree of the court against collateral attack.[47] The subsequent history of this doctrine in the field of res judicata will be considered later in this article.

The theory that a jurisdiction to determine jurisdiction exists to support a restraining order, even though the order is subsequently determined to have been made without jurisdiction, seems never to have been applied by the Supreme Court in a case involving the duty to obey an invalid restraining order prior to the decision in *United States v. United Mine Workers*.[48] But the doctrine had been previously applied by the Circuit Court of Appeals for the Fifth Circuit in a case raising the issue of whether such a duty existed. In *Carter v. United States*,[49] the circuit court,

[47] Des Moines Navigation & R. Co. v. Iowa Homestead Co., 123 U.S. 552, 557–59 (1887). But cf. Vallely v. Northern Fire & Marine Ins. Co., 254 U.S. 348 (1920). In the early cases, such as McCormick v. Sullivant, 10 Wheat. (U.S.) 192 (1825), the Court did not articulate the idea of "jurisdiction to determine jurisdiction." But some of the subsequent cases, such as Des Moines Navigation & R. Co. v. Iowa Homestead Co., 123 U.S. 552, 559 (1887), enunciated this doctrine: "To determine whether the suit was removable in whole or in part or not, was certainly within the power of the Circuit Court. The decision of that question was the exercise and the rightful exercise of jurisdiction, no matter whether in favor of or against taking the cause." Compare Grignon's Lessee v. Astor, 2 How. (U.S.) 319, 339 (1844).

[48] 330 U.S. 258 (1947). In view of this decision, it is pointless to speculate on the inferences which might be drawn from the fact that the Supreme Court did not refer to this doctrine on occasions when its discussion might have been pertinent, as in Thomas v. Collins, 323 U.S. 516 (1945). There was no suggestion in any of the earlier cases which have been discussed in this article (In re Sawyer, Ex parte Rowland, and In re Ayers) that a void order was entitled to obedience pendente lite simply because the lower court had jurisdiction to determine its own jurisdiction.

[49] 135 F. 2d 858 (C.C.A. 5th, 1943). In addition, the doctrine, or something very much like it, was expounded in Passmore Williamson's Case, 26 Pa. 9 (1855), by the Pennsylvania Supreme Court. In that case Williamson, who had been sentenced for criminal contempt by a federal court, petitioned the Pennsylvania Supreme Court for a writ of habeas corpus. Williamson's contempt citation had been based on his failure to make an adequate return to a writ of habeas corpus issued by the federal court. In applying to the Pennsylvania Court, Williamson argued that the federal court had no jurisdiction to entertain the habeas corpus proceeding and that his commitment for contempt was accordingly void. The Supreme Court of Pennsylvania rejected this argument and refused to issue the writ. Writing for the Court, Judge Jeremiah Black said: "But certainly the want of jurisdiction alleged in this case would not even have been a defence on the trial. The proposition that a court is powerless to punish for disorderly conduct or disobedience of its process in a case, which it ought ultimately to dismiss

with Judge Hutcheson dissenting, reviewing the earlier cases, including *In re Sawyer* and *In re Fisk*, distinguished them or dismissed them as not applicable, applied the doctrine of "jurisdiction to determine jurisdiction" as developed in the decisions dealing with res judicata and collateral attack, and held that a litigant was bound to obey a temporary restraining order even though the order was made by a federal court that did not have jurisdiction of the subject matter of the litigation.[50]

The statement that the Supreme Court had never applied this doctrine of jurisdiction to determine jurisdiction in a case involving the validity of a restraining order does not disregard the decision in *United States v. Shipp*.[51] In that case Johnson had been tried, convicted and sentenced to death by a court of the state of Tennessee. He petitioned a United States circuit court for a writ of habeas corpus on the ground that in the course of trial he had been deprived of his rights under the federal Constitution. The circuit court denied the writ and Johnson appealed to the Supreme Court, which allowed the appeal. Pending the appeal, the Supreme Court issued an order staying all proceedings against Johnson and directing Shipp, who was sheriff of a county in Tennessee, to retain custody of

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for want of jurisdiction, is not only unsupported by judicial authority, but we think it is new even as an argument at the bar. We ourselves have heard many cases through and through before we became convinced that it was our duty to remit the parties to another tribunal. But we never thought our process could be defied in such cases more than in others.

"There are some proceedings in which the want of jurisdiction would be seen at the first blush; but there are others in which the court must inquire into all the facts before it can possibly know whether it has jurisdiction or not. Any one who obstructs or baffles a judicial investigation for that purpose is unquestionably guilty of a crime for which he may and ought to be tried, convicted, and punished. Suppose a local action to be brought in the wrong county; this is a defence to the action, but a defence which must be made out like any other. While it is pending, neither a party, nor an officer, nor any other person can safely insult the court, or resist its order. The court may not have power to decide upon the merits of the case; but it has undoubted power to try whether the wrong was done within its jurisdiction or not." Ibid., at 21.

[50] One interesting question that arises with respect to the doctrine of jurisdiction to determine jurisdiction is whether the theory supports the validity of an order only during the period in which the court of first instance is making up its mind on the question of jurisdiction, or whether the validity of the order is supported until it is reviewed by the highest appellate court to which resort may be had. Judge Hutcheson, dissenting in Carter v. United States 135 F. 2d 858, 863 (C.C.A. 5th, 1943), seems to have believed that the majority regarded the validity of the order as temporary only, so that the majority would not have upheld a conviction for contempt of a permanent injunction. However, the majority decision was not explicit on this point. The idea that validity of the order continues only so long as the court of first instance makes up its mind on the question of jurisdiction is not consistent with statements in the majority opinion in the Mine Workers case. United States v. United Mine Workers, 330 U.S. 258, 293 (1947). Cases involving the res judicata problem do not present this particular point. There the jurisdiction to determine jurisdiction is regarded as supporting the permanent validity of the order or judgment in the sense of making it binding upon the parties so that it is not subject to collateral attack.

[51] 203 U.S. 563 (1906).

Johnson. Johnson was thereafter taken from jail and lynched. Shipp, together with others, was charged with contempt of the Supreme Court. Shipp denied the jurisdiction of the Supreme Court to punish for contempt on the ground that the constitutional questions raised by Johnson in support of his petition for a writ of habeas corpus were frivolous and that accordingly neither the circuit court nor the Supreme Court had jurisdiction of the cause. The Supreme Court rejected this contention.

The decision in the *Shipp* case can hardly be regarded as an unqualified application of the doctrine of jurisdiction to determine jurisdiction. To the extent that it embodies or applies that notion at all, it deals with a special kind of jurisdiction. In that case the order that was vindicated was not an order made by the lower federal court but an order made by the Supreme Court in aid of its own appellate jurisdiction. The Supreme Court held, in effect, that it had appellate jurisdiction regardless of the question of the jurisdiction of the lower court, and that, therefore, the order that it had made in aid of its own jurisdiction was not void.[52] The conclusion that the Supreme Court had appellate jurisdiction regardless of the jurisdiction of the lower court was consistent with decisions of the Supreme Court both before and after *In re Shipp*.[53]

One other aspect of *In re Shipp* deserves comment. Doubtless the petitioners in the *Shipp* case had violated that part of the order of the Supreme Court that directed "that . . . custody of said appe'lant be retained pending this appeal." But the gravamen of the charge against Shipp and the other petitioners was not merely that Shipp had failed to retain custody of the prisoner, but that Shipp and the others had conspired to destroy Johnson so that the appellate power of the Supreme Court was rendered wholly nugatory. It seems quite possible that even in the absence of the order petitioners could have been punished for contempt of court.[54]

[52] In its brief on the preliminary questions of law in the Shipp case, the United States argued that even if the circuit court did not have jurisdiction to issue the writ of habeas corpus the Supreme Court nevertheless had jurisdiction to entertain and act upon the appeal, citing Ex parte Royall, 117 U.S. 241 (1886).

[53] In the United States v. Corrick, 298 U.S. 435, 440 (1936), the Court declared: "While the District Court lacked jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." See Mansfield, Coldwater, & Lake Michigan Ry. Co. v. Swan, 111 U.S. 379 (1884); Stickney v. Wilt, 23 Wall. (U.S.) 150, 163 (1874).

[54] Compare Merrimack River Savings Bank v. Clay Center, 219 U.S. 527, 535–36 (1911). In that case the question for decision was whether a litigant who had destroyed electric light poles could be punished by the Supreme Court for contempt. The Supreme Court had not issued an order directing the litigant to preserve the poles, but such an order had been issued by the lower court. It was argued that any contempt committed must have been contempt of the lower court order, and not one which could be punished by the Supreme Court. The Court rejected this contention, stating: "[I]rrespective of any such injunction actually issued the

The destruction of the subject matter of litigation is a direct, violent and irrevocable interference with the judicial process. It would not be unreasonable to say that the criminality of that kind of contempt does not depend upon the existence of a court order forbidding the destruction.[55]

Enough has now been said about the earlier decisions to provide a background for comment on the decision in *United States v. United Mine Workers*. That decision has been the subject of so much discussion[56] that it should be unnecessary either to review the facts or to summarize in detail the opinions that were delivered by the different members of the Supreme Court.

One of the fundamental issues in the case was whether the restraining order and the temporary injunction, which the union and its president were charged with disobeying, had been issued in violation of the provisions of the Norris-LaGuardia Act.[57] It seems appropriate to begin the discussion of the case by considering whether the limitations imposed upon the courts by the Norris-LaGuardia Act are truly jurisdictional in the sense that an order issued in disregard of the limitations should be regarded as void.

The Norris-LaGuardia Act does not deprive the federal courts of jurisdiction over cases involving labor disputes. It does not deprive the federal courts of power to issue injunctions in cases involving labor disputes. Speaking generally, the effect of the statute may be described in the following terms: In any case in which the statute applies, two consequences follow: 1) The federal courts are forbidden to grant injunctions that restrain the commission of certain specified acts.[58] 2) The courts are forbidden to grant injunctions except in compliance with certain procedural re-

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willful removal beyond the reach of the court of the subject-matter of the litigation or its destruction pending an appeal from a decree praying, among other things, an injunction to prevent such removal or destruction until the right shall be determined, is, in and of itself, a contempt of the appellate jurisdiction of this court."

[55] Justice Holmes, both in his opinion in the Shipp case and in his subsequent opinion in Jones v. Springer, 226 U.S. 148, 155–56 (1912), referred to the authority exercised in the Shipp case as a power arising "from the necessity of the case," and one whose exercise was necessary "to preserve" the subject matter of the litigation.

[56] Watt, The Divine Right of Government by Judiciary, 14 Univ. Chi. L. Rev. 409 (1947); see also 47 Col. L. Rev. 505 (1947); 60 Harv. L. Rev. 811 (1947); 42 Ill. L. Rev. 372 (1947); 45 Mich. L. Rev. 469 (1947); 22 N.Y.U. L.Q. Rev. 337 (1947); 33 Va. L. Rev. 266 (1947); 19 Tenn. L. Rev. 988 (1947); and 15 Geo. Wash. L. Rev. 497 (1947), all noting the Mine Workers case.

[57] 47 Stat. 70 (1932), 29 U.S.C.A. § 101 (1947).

[58] 47 Stat. 470 (1932), 29 U.S.C.A. § 104 (1947).

quirements with respect to the taking of evidence in open court, notice and the making of appropriate findings of fact, etc.[59]

In a number of cases arising before the *Mine Workers* case, the Supreme Court referred to the Norris-LaGuardia Act as a statute intended to limit and to restrict the exercise of the equitable powers of the federal courts.[60] In *Yakus v. United States*[61] Chief Justice Stone, writing for the majority of the Court, listed the Norris-LaGuardia Act, together with a number of other statutes that limit the power of the federal courts to issue injunctions, and described these statutes as "the legislative formulation of what would otherwise be a rule of judicial discretion. . . ."[62] These are hardly apt words to describe a statute believed to control jurisdiction in the basic or primary sense.

It has already been pointed out[63] that the decisions of the Supreme Court dealing with the concept of equity jurisdiction support the conclusion that questions about the existence of equity jurisdiction are not the kind of jurisdictional questions that, if erroneously decided, make a judicial order void. If this is true of the existence of equity jurisdiction, why should it not be equally true of questions that arise with respect to limitations on the exercise of equitable jurisdiction once it is found to exist? These considerations suggest that had the Supreme Court chosen to do

[59] 47 Stat. 72 (1932), 29 U.S.C.A. § 109 (1947).

[60] The Norris-LaGuardia Act was styled "An Act to Amend the Judicial Code and to define and limit the jurisdiction of Courts sitting in equity." See particularly Brotherhood of Railroad Trainmen v. Toledo, Peoria & Western R.R., 321 U.S. 50, 58 (1944); United States v. Hutcheson, 312 U.S. 219, 231 (1941); Milk Wagon Drivers' Union v. Lake Valley Farm Products Co., 311 U.S. 91, 101 (1940), in all of which the Supreme Court insisted that the limitations placed upon the Court were severe and should be given great weight in determining congressional policy toward the exercise of judicial power in labor controversies. Yet in all these cases the Court seemed to speak in terms of a limitation upon the exercise of equity jurisdiction. Thus, in the Railroad Trainmen case the Court said of the Norris-LaGuardia Act: "The latter did not entirely abolish judicial power to impose previous restraint in labor controversies. But its prime purpose was to restrict the federal equity power in such matters within greatly narrower limits than it had come to occupy."

[61] 321 U.S. 414 (1944).

[62] In the case of at least two of the statutes listed by Chief Justice Stone in this passage, the Supreme Court has held that the limitation imposed is not jurisdictional in character. Atlas Life Ins. Co. v. W. I. Southern, Inc., 306 U.S. 563, 570 (1939), dealt with the provisions of 28 U.S.C.A. § 384 (1928) that suits in equity shall not be sustained in the courts of the United States where plain, complete, and adequate remedy may be had at law; Smith v. Apple, 264 U.S. 274, 278–79 (1924) construed 28 U.S.C.A. § 379 (1928), which prohibits the federal courts from issuing injunctions staying proceedings in a state court. Two points, however, should be noted about those statutes and the cases cited: 1) Although the prohibition contained in the statutes was unequivocal, neither statute used the word "jurisdiction." 2) The statements were not made with respect to the question of whether a restraining order made in violation of the statutes would be void.

[63] See text at notes 33–35 supra, and cases cited therein.

so, it might properly have rested its decision in the *Mine Workers* case on the ground that the Norris-LaGuardia Act is not an act affecting the basic jurisdiction of the courts; that, at most, it merely limits the exercise of equitable jurisdiction, and that the questions that arise with respect to its application are not the kind of jurisdictional questions that, if erroneously decided, make an order void.[64]

At least two objections might be made to this suggestion. In the first place, it might be said that the statute itself speaks in terms of jurisdiction —that the important prohibitory sections of the statute begin: "No Court of the United States shall have jurisdiction . . . ." Because of this explicit command, it could be argued that the Court was bound to decide that infirmities caused by disregard of the statute were truly jurisdictional in character.

But the use of the word "jurisdiction" in the statute hardly seems conclusive. In *Burnet* v. *Desmornes*[65] Justice Holmes pointed out that words of a statute that "might seem to affect the power of the court" may merely "fix the law by which the court should decide." In any event, the word "jurisdiction" is used in the Norris-LaGuardia Act in a context that shows that the word refers to "equity jurisdiction." Accordingly, even if the word is given full weight, its use does not require the conclusion that a restraining order or preliminary injunction issued in disregard of the Act's requirements is void, because the better view would seem to be, as pointed out above, that even total absence of equity jurisdiction does not make a judicial order void.

In the second place, it may be argued that, apart from the use of the word "jurisdiction" in the statute, the prohibitions of the Norris-La Guardia Act are so explicit and unqualified that it is obvious that Congress intended any restraining order or preliminary injunction issued in disregard of those prohibitions to be void. But the fact that the command of the statute is explicit and unqualified is not in itself conclusive of the point now under consideration. Apart from the use of the word "jurisdiction," the prohibitions of the Norris-LaGuardia Act are no more explicit than those of Section 265 of the Judicial Code,[66] which provide that the writ

[64] In three states courts have construed state statutes similar to the Norris-LaGuardia Act as imposing limitations not strictly jurisdictional in character. Main Cleaners & Dyers, Inc. v. Columbia Super Cleaners, Inc., 332 Pa. 71, 2 A. 2d 750 (1938); Reid v. Independent Union of All Workers, 200 Minn. 599, 275 N.W. 300 (1937); State ex rel. Hopkins v. Howat, 109 Kan. 376, 383–84, 198 Pac. 686, 690 (1921). For a contrary view of the New York anti-injunction statute, see People ex rel. Sandnes v. Sheriff of Kings County, 164 N.Y. Misc. 355, 299 N.Y. Supp. 9 (1937).

[65] 226 U.S. 145, 147 (1912); see Fauntleroy v. Lum, 210 U.S. 230, 234–35 (1908).

[66] 36 Stat. 1162 (1911), 28 U.S.C.A. § 379 (1928).

of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state except where the injunction may be authorized by any law relating to proceedings in bankruptcy; or than the provisions of Section 277 of the Judicial Code,[67] which forbid the courts of the United States to entertain any suit in equity if there is a plain, adequate, and complete remedy at law; or than the provisions of the Act of October 15, 1914,[68] which state flatly that every injunction and restraining order shall set forth the reasons for its issuance. The Supreme Court has held in the case of each of these statutes that the limitations it imposes are not jurisdictional in character.[69]

Whatever merit may exist in the view of the statute just suggested, it is fairly clear that the view was not adopted by the Supreme Court in the *Mine Workers* case. True enough, there are passages in the opinion of Chief Justice Vinson that suggest the district court had jurisdiction even if the Norris-LaGuardia Act applied. For example, the Chief Justice said: "[W]e find impressive authority for the proposition that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings."[70] In addition, he continued, "We insist upon the same duty of obedience where, as here, the subject matter of the suit, as well as the parties, was properly before the court; where the elements of federal jurisdiction were clearly shown; and where the authority of the court of first instance to issue an order ancillary to the main suit depended upon a statute, the scope and applicability of which were subject to substantial doubt."[71]

But other passages in the Chief Justice's opinion are inconsistent with the view that no truly jurisdictional question was involved. Thus, Chief

[67] 36 Stat. 1163 (1911), 28 U.S.C.A. § 384 (1928).

[68] 38 Stat. 738 (1914), 28 U.S.C.A. § 383 (1928).

[69] Section 265 of the Judicial Code: Woodmen of the World v. O'Neill, 266 U.S. 292 (1924); Smith v. Apple, 264 U.S. 274 (1924).

Section 267 of the Judicial Code: Atlas Life Ins. Co. v. W. I. Southern, Inc., 306 U.S. 563, 570 (1939) ("[T]he issue is not one of jurisdiction but of the need and propriety of equitable relief. . . ."); Di Giovanni v. Camden Fire Ins. Ass'n, 296 U.S. 64, 69 (1935).

Act of October 15, 1914: Lawrence v. St. L.-S.F. Ry. Co., 274 U.S. 588, 591–92 (1927); Druggan v. Anderson, 269 U.S. 36, 40 (1925).

[70] 330 U.S. 258, 293 (1947). In this portion of his opinion the Chief Justice cited Howat v. Kansas, where the Supreme Court stated that it regarded the injunction as one issued by a court having jurisdiction both of the person and of the subject matter. This had also been the view of the Kansas Supreme Court, which had asserted that the lower court had jurisdiction and that the injunction, although erroneous, was not void. State ex rel. Hopkins v. Howat 109 Kan. 376, 384, 198 Pac. 686, 690 (1921).

[71] 330 U.S. 258, 294 (1947).

Justice Vinson qualified the scope of his decision by this assertion: "Although a different result would follow were the question of jurisdiction frivolous and not substantial such contention would be idle here."[72] This statement seems to imply that the true issue in the case was one of jurisdiction and not merely whether the court below had improperly issued an order ancillary to the main suit. In another passage of his opinion, the Chief Justice, after describing the circumstances in which the district court issued the restraining order, declared: "In these circumstances, the District Court unquestionably had the power to issue a restraining order for the purpose of preserving existing conditions pending a decision upon its own jurisdiction."[73] In this sentence the Chief Justice appears to be applying the doctrine of jurisdiction to determine jurisdiction.

If, in fact, the application of the Norris-LaGuardia Act did not raise a truly jurisdictional question, that is to say, if the district court had jurisdiction of the subject matter notwithstanding any error it may have made in construing the Norris-LaGuardia Act, then both the non-frivolous character of the issue involved and the notion of jurisdiction to determine jurisdiction would be beside the point. The references to both of these matters in the opinion of the Chief Justice make it difficult to determine whether he believed that the issue in the case related to the jurisdiction of the district court, in the strict sense of the word "jurisdiction," or that the issue related only to the authority of that court to issue an ancillary order in a case in which it had jurisdiction.

The opinion of Justice Frankfurter, whose concurrence was necessary to establish a majority of the Court, raises less doubt. It seems clear that Justice Frankfurter was prepared to hold that in some situations an injunction issued in violation of the provisions of the Norris-La Guardia Act would be void and need not be obeyed pendente lite.[74] Justice Frankfurter appears to have reached the conclusion that the defendants were bound to obey the temporary restraining order and the preliminary injunction by the following reasoning: The question whether the Norris-LaGuardia Act applied to the dispute between the defendants and the United States raised a "complicated and novel" issue; the district court had power to decide whether the case was properly before it, and

[72] Ibid., at 293. [73] Ibid., at 290.

[74] For example, Justice Frankfurter said, "Thus, the explicit withdrawal from federal district courts of the power to issue injunctions in an ordinary labor dispute between a private employer and his employees cannot be defeated, and an existing right to strike thereby impaired, by pretending to entertain a suit for such an injunction in order to decide whether the court has jurisdiction. In such a case, a judge would not be acting as a court. He would be a pretender to, not a wielder of, judicial power." Ibid., at 310.

therefore it could make appropriate orders "to afford the necessary time for fair consideration and decision while existing conditions were preserved. . . . To say that the authority of the Court may be flouted during the time necessary to decide is to reject the requirements of the judicial process."[75] In his opinion Justice Frankfurter discussed at greater length than did the Chief Justice the non-frivolous character of the issue which had been raised with respect to the authority of the district court.

This is an appropriate point to comment briefly on the importance attached by the majority of the Court in the *Mine Workers* case to the conclusion that the assertion of authority by the district court was not frivolous. Little in the older decisions of the Supreme Court suggests that the question of the duty to obey pendente lite an invalid restraining order turns on whether the assertion of jurisdiction is frivolous. Certainly the questions involved in *In re Sawyer*, *In re Ayers*, and *Ex parte Fisk* were substantial questions. Yet the Court did not hesitate to conclude in those cases that the litigants were entitled to disobey the restraining orders with impunity because those orders were made without jurisdiction and were therefore void.[76]

The theory that the non-frivolous character of the assertion of jurisdiction is relevent to the issue of whether a restraining order must be obeyed pendente lite seems first to have been advanced in two decisions of the Circuit Court of Appeals for the Fifth Circuit, *Locke v. United States*,[77] and *Carter v. United States*.[78] In the first of these cases, the *Locke* case, the circuit court, in suggesting that a restraining order should be obeyed pendente lite if the assertion of authority was not frivolous, quoted with approval the following passage from the opinion of the Supreme Court in *Binderup v. Pathé Exchange*:[79] "Jurisdiction, as distinguished from merits, is wanting only where the claim set forth in the complaint is so unsubstantial as to be frivolous or, in other words, is plainly without color of merit." This statement was made by the Supreme Court in the *Binderup* case in the course of deciding that a judgment of a district court that

[75] Ibid., at 310–11. Compare the remarks of Judge Jeremiah Black in Passmore Williamson's Case, 26 Pa. 9, 21 (1855), quoted in note 49 supra.

[76] As pointed out in the text at note 47 supra, the doctrine of jurisdiction to determine jurisdiction seems first to have been developed in cases where the ultimate question was one of res judicata or collateral attack. The issue in those cases always related to the finality of a judgment alleged to be void for want of jurisdiction. It is hardly to be expected that those cases would suggest that the existence of the jurisdiction to determine jurisdiction was dependent upon, or related in any way to, the question whether the assertion of jurisdiction was frivolous.

[77] 75 F. 2d 157 (C.C.A. 5th, 1935).

[78] 135 F. 2d 858 (C.C.A. 5th, 1943).

[79] 263 U.S. 291, 305–6 (1923).

dismissed a pleading, on the ground that it did not state facts sufficient to constitute a cause of action under the Sherman Act, was not a judgment touching the jurisdiction of the district court.[80] The statement was not made with reference to whether a litigant is bound to obey pendente lite a restraining order issued without jurisdiction, and it is doubtful whether this statement (or similar statements made in opinions of the Supreme Court dealing with issues like the issue raised in the *Binderup* case) gives any substantial support to the notion that a restraining order made without jurisdiction should be obeyed merely because the assertion of jurisdiction is not frivolous.[81]

Whatever may be said about the historical basis of the doctrine of the non-frivolous order, the decision in the *Mine Workers* case has given that doctrine a stature that it has not heretofore possessed. Henceforth, a litigant who wishes to disregard a temporary restraining order must be sure not only that the order was made without jurisdiction but also that the assertion of jurisdiction is frivolous. It is difficult to say what degree of frivolity will be required before the order made without jurisdiction may safely be disregarded. The fact that Chief Justice Vinson cited with approval the decision in *Carter v. United States*,[82] is not reassuring on this point. There the jurisdiction of the federal court was invoked on the ground that the Norris-LaGuardia Act conferred upon the federal courts jurisdiction of any controversy involving a labor dispute irrespective of the existence of diversity of citizenship or of any other ground of federal

[80] After the plaintiff's opening statement to the jury the district court had instructed the jury to return a verdict for the defendants on the ground that the pleadings and the opening statement, taken together, did not state facts sufficient to constitute a cause of action under the Sherman Act. After the circuit court affirmed the judgment, the plaintiff sought a writ of error in the Supreme Court. In the Supreme Court the defendants moved to dismiss the writ of error, alleging that Section 238 of the Judicial Code required writs of error to be taken directly to the Supreme Court in any case in which the jurisdiction of the district court was in issue. The Supreme Court refused to dismiss the writ of error, holding that the district court's decision had to do with the merits of the case and not with that court's jurisdiction.

[81] Statements somewhat similar to that in the Binderup case may be found in Hart v. B. F. Keith Vaudeville Exchange, 262 U.S. 271, 273 (1923); Swafford v. Templeton, 185 U.S. 487, 493–94 (1902). Another line of cases discusses the relationship between the substance of a claim and the existence of jurisdiction. These cases deal with the problem of whether writ of error or certiorari is the proper method for Supreme Court review of state court decisions which allegedly raise federal questions. Zucht v. King, 260 U.S. 174, 176 (1922); United States Fidelity & Guaranty v. Oklahoma, 250 U.S. 111, 112 (1919); Ennis Water Works v. Ennis, 233 U.S. 652, 658 (1914); Deming v. Carlisle Packing Co., 226 U.S. 102 (1912); Equitable Life Assurance Society v. Brown, 187 U.S. 308 (1902); New Orleans Water Works Co. v. Louisiana, 185 U.S. 336 (1902). It would be impossible adequately to discuss this line of cases within the compass of this article. It is enough to say that they turn on considerations that seem irrelevant to the problem now being considered.

[82] 135 F. 2d 858 (C.C.A. 5th, 1943).

jurisdiction.[83] It is difficult to think of an assertion of jurisdiction more lacking in substance.

The decision in the *Mine Workers* case, read against the background of the earlier decisions, raises the question whether the time has come, at least so far as concerns jurisdiction of subject matter, to discard the distinction between orders void because made without jurisdiction and merely erroneous orders, and to adopt instead a different test to determine whether an erroneous order should be obeyed pendente lite. This suggestion is restricted to jurisdiction of the subject matter for two reasons (although there may be others of equal weight):

1. Although the existence of jurisdiction over the person is sometimes a difficult question, in general the concept of jurisdiction of the person is more certain in its outline and content and easier of application to particular situations than is the concept of jurisdiction of subject matter.

2. The relationship between jurisdiction and the duty to obey seems more direct in the case of an order made without jurisdiction of the person than it is in the case of an order made without jurisdiction of the subject matter. The remark of Justice Holmes that "the foundation of jurisdiction is physical power"[84] applies to jurisdiction over the person in a sense in which it does not apply to jurisdiction of the subject matter. It appears not unreasonable to say that an order made by a court that has no physical power over the litigant is an order that need not be obeyed. Certain practical considerations may apply when a court lacks jurisdiction of the person that may not be present if the court lacks jurisdiction of the subject matter: An order made without jurisdiction of the person may be an order made without notice to the litigant or issued in circumstances in which it is difficult, or impossible, for the litigant to contest the order. Attempts to contest the validity of orders made without jurisdiction of the person sometimes raise questions of consent and waiver that are not raised by attempts to contest jurisdiction over the subject matter.[85]

The suggestion that the existence of jurisdiction of the subject matter should be discarded as a test of the duty of the litigant to obey an invalid order is not intended to lead to the conclusion that the litigant should obey, pendente lite, every invalid restraining order, no matter what its character or effect may be, made by a court having jurisdiction of the litigant's person. There will be cases in which the litigant should be free to disregard an invalid restraining order. But the circumstances that should

[83] But see Brown v. Coumanis, 135 F. 2d 163 (C.C.A. 5th, 1943).

[84] McDonald v. Mabee, 243 U.S. 90, 91 (1917).

[85] See Davis v. Davis, 305 U.S. 32 (1938).

be regarded as justifying that disobedience have no necessary relevance to the distinction between orders void because made without jurisdiction of the subject matter and orders that are merely erroneous.

In determining whether a litigant should be required to obey, pendente lite, a restraining order or temporary injunction that the litigant believes is invalid because the court issuing it did not have jurisdiction of the subject matter, two points are of substantial importance:

1. As long as the litigant has an adequate opportunity to seek appellate review of the order's validity in the normal way, there seems to be no reason to permit him to resort to disobedience as a means of testing the order's validity.[86] It seems reasonable, therefore, to say that unless the litigant has exhausted his opportunities (by the prompt filing of an appeal and by the application for stays, pending appeal) to have the order reviewed in the usual way, he has no standing to insist upon testing the order's validity by disobedience.[87] Situations may arise, however, in which there is no right of appeal. For example, there is serious doubt whether the provisions of the Judicial Code permit an appeal to a circuit court of appeals from an order of a district court granting a temporary restraining order as distinguished from a preliminary injunction.[88]

[86] In the Mine Workers case the defendants made no attempt to obtain appellate review of the temporary restraining order. They did not move to vacate that order. The first motion which the defendants made in the case was a motion made on November 26, 1946 to discharge and to vacate the rule which had previously issued requiring them to show cause why they should not be punished for contempt. Apparently, however, their counsel had appeared on the previous day, pursuant to the order to show cause, and denied the jurisdiction of the court.

[87] The courts would probably be reluctant to punish a litigant for the violation of a restraining order or a temporary injunction committed while the litigant, in good faith and with due diligence, was trying to get a stay. See Salmon River Canal Co. v. District Court, 38 Idaho 377, 387–88, 221 Pac. 135, 139 (1923).

[88] Decisions on this point under Section 129 of the Judicial Code, 36 Stat. 1134 (1911), 28 U.S.C.A. § 227 (1940), present conflicting views. Pack v. Carter, 223 Fed. 638 (C.C.A. 9th, 1915); Pressed Steel Car Co. v. Chicago & Alton R. Co., 192 Fed. 517 (C.C.A. 7th, 1911); Taylor v. Breese, 163 Fed. 678 (C.C.A. 4th, 1908). The prevailing opinion seems to be, however, that no appeal can be taken under this section of the Judicial Code from the granting of a temporary restraining order, because the order is merely incidental to the proceedings that may lead to a preliminary injunction. Schainmann v. Brainard, 8 F. 2d 11, 12 (C.C.A. 9th, 1925). Compare Section 10 of the Norris-LaGuardia Act, 47 Stat. 72 (1932), 29 U.S.C.A. § 110 (1947), which provides for prompt appeals from orders granting temporary injunctions, but presumably does not apply to the granting of temporary restraining orders.

But if there is a hearing on a notice to vacate or to dissolve a temporary restraining order and the order is continued, it can be persuasively argued that an appeal will lie. See Schainmann v. Brainard, 8 F. 2d 11 (C.C.A. 9th, 1925); Ettelson v. Metropolitan Life Ins. Co., 317 U.S. 188, 192 (1942), in which the Supreme Court stated, "The relief afforded by Section 129 is not restricted by the terminology used. The statute looks to the substantial effect of the order made."

Thus, in the Mine Workers case, if the union had moved to dissolve the temporary restraining order, and if there had been a hearing resulting in an adverse decision denying the motion and continuing the order, the union might have been able to appeal.

It may well be, therefore, that circumstances may exist in which a litigant, either because he has no right of appeal or because he has not been able to obtain a stay pending appeal, is faced with a choice between immediate obedience to a restraining order that he believes to be invalid or defiance of the order. In those situations, the second consideration comes into play.

2. The second consideration deals with the effect that obedience will have upon the litigant's position and rights. If the temporary restraining order or the preliminary injunction in effect decides the only question involved in litigation and thus really disposes of the merits of the case, it is the kind of order that a litigant should not be compelled to obey pending its review.[89]

On the other hand, if the order injures or affects the litigant only in an abstract or theoretical sense, then no matter how erroneous or improper it may be, there is no good reason for the litigant not to obey the order while the order is being reviewed in the usual way. Thus, if an order prohibits the commission of certain acts by the litigant and the postponement of the commission of those acts pending review will not, in fact, seriously prejudice the litigant, the rule suggested would require the litigant to obey even though his rights, considered in the abstract, may be infringed by the order and even though he may be to some extent inconvenienced.[90]

In instances in which the order requires the litigant to take affirmative action, the question to be decided is whether the affirmative action will, in fact, irrevocably injure or prejudice the litigant's rights. The possibility of making this showing will always presumably be greater in the case of an affirmative order than it will be in the case of an order that is merely prohibitory. But even in the case of the affirmative order, there may well be instances in which the action required can be recalled or undone after

[89] Compare the state court decisions holding that a preliminary injunction that divests rights or attempts to transfer the possession of property is not only erroneous but void. State ex rel. Reynolds v. Graves, 66 Neb. 17, 21, 92 N.W. 144, 145 (1902); Tawas & Bay County R.R. v. Circuit Judge, 44 Mich. 479, 482, 7 N.W. 65, 66 (1880); cf. Weaver v. Toney, 107 Ky. 419, 54 S.W. 732 (1899); People ex rel. Port Huron & Gratiot Ry. Co. v. Judge of St. Clair Circuit, 31 Mich. 456 (1875).

The holding in these cases that the orders were void seems difficult to defend. In each case the court appears to have had jurisdiction both of the person and of the subject matter. The decisions, however, illustrate the reluctance of the courts to enforce obedience to an invalid order if obedience will inflict serious and irrevocable injury upon the litigant.

[90] Compare the comment in 2 High, Injunctions § 1425 (4th ed., 1905): "The practice, however, of thus disregarding the solemn mandate of the court, although it be void, is not to be encouraged and, except in cases where serious injury might otherwise result, the aggrieved party would better resort to the more orderly method either of applying to the court for a dissolution of the injunction or of seeking relief by appeal."

the invalidity of the order has been established, without real prejudice to the litigant.[91]

Thus, if the injury that will be inflicted upon the litigant's interest by compliance with the order believed to be invalid will be substantial and irreparable, then and only then should disobedience of the order be immune from punishment in the event that the litigant ultimately establishes the invalidity of the order.

In short, I suggest that the general rule should be that it is the duty of the litigant to obey all orders made by a court having jurisdiction of his person, pendente lite, regardless of the decision that is made with respect to the ultimate validity of those orders, with this exception: If the litigant has exhausted all the normal methods of appellate review and if obedience to the order will substantially and irrevocably injure legal interests of the litigant that are not remote and abstract in character, then the litigant should be entitled to take his chance on the invalidity of the order. If he prevails in his attack upon its validity, he should be immune from punishment for contempt. This rule should be applied in those cases in which the temporary order is merely erroneous as well as those cases in which it is asserted to have been made without jurisdiction. The fact that under the traditional rule a litigant, who is prohibited from taking action or required to take action by an order that is merely erroneous and not void because without jurisdiction, has no remedy even though he has no opportunity for appellate review, is an anomaly that should be removed from the law. As indicated earlier in this article, the unfairness of this result may well have induced the Supreme Court in some cases in the past to treat infirmities as jurisdictional when strictly they should not have been so regarded.[92]

In conclusion, it will be helpful to refer briefly to arguments that may be made for and against the proposal advanced:

In support of the proposal, it can be said that, in general, public policy looks with favor upon the principle that litigants should comply with orders issued by the courts until those orders are reversed or set aside by normal appellate procedures. If there are to be exceptions to that public policy, the exceptions should be stated in terms that are, as far as possible, free from ambiguity and that have some relevance to the practical con-

[91] I venture to think that this was the situation in the Mine Workers case. In all probability the union would not have been seriously prejudiced if the notice of termination of the contract had been suspended pending determination of the right to terminate the contract, assuming, of course, as I think it is proper to assume, that speedy review of that question would have been possible.

[92] See text at notes 43–44 supra; see also note 89 supra.

siderations that may justify disobedience in particular situations. The concept of jurisdiction of the subject matter is so elusive and has been treated with so much inconsistency by the courts that it is both unsatisfactory and difficult of application to particular situations if used as a test of the duty to obey. It is not a test having any necessary relevance to the reasons that may justify disobedience in particular situations.

It may be objected, however, that the two considerations that have been suggested as tests of the right to disobey an invalid order are just as vague and unsatisfactory as absence of jurisdiction of the subject matter. But the question of whether the litigant has exhausted his normal appellate remedies is one that can usually be determined without difficulty. A judgment about the effect which obedience to the order will have upon the litigant's rights may be difficult in particular situations. But surely it is less difficult to make this decision than it is to decide (1) whether the court issuing the order had jurisdiction of the subject matter and (2) whether the assertion of jurisdiction is so irrational that it may be disregarded as frivolous.

The procedural and substantive peculiarities of a proceeding for criminal contempt and the confusion between civil and criminal contempt that to some extent still exists make the contempt proceeding an inappropriate device for reviewing the validity of judicial orders. This is an additional reason for restricting any exception to the general principle that a litigant must seek review of any erroneous orders by the normal appellate procedure within the narrowest compass consistent with the public interest.

It may be said that to do away with the distinction between orders void because made without jurisdiction and those that are merely erroneous will remove an important restraint on the usurpation of power by the courts. There is weight in this objection. But if the commands of Congress and the lessons of the earlier decisions are clear, it may be assumed that the courts will stay within the limits of their authority. In doubtful cases, the courts may exceed their authority. If they do so, under the rule suggested, their orders may have to be obeyed until reversed. But that seems to be the law under the *Mine Workers* case. Certainly it would be a rash litigant today who would conclude that he could safely disregard an order made in disregard of some statutory limitation on the powers of a federal court so long as there was any possible ground for argument that the assertion of the authority was not frivolous. As matters now stand, the doctrine of the order that is void because made without jurisdiction is rather an enigma for the litigant than a limitation on the courts.

In the field of res judicata the courts have largely abandoned the distinction between jurisdictional infirmities, on the one hand, and mere error, on the other, as a test for determining whether a prior adjudication is binding. The development of the law in this respect has been the subject of full comment in the law journals and will not be discussed in detail here.[93] Briefly, however, it may be said that although the federal courts started with the generalization that an order made without jurisdiction is void and can be attacked collaterally in any other proceeding, step by step they have qualified and limited this generalization until it has finally been held that the doctrine of res judicata applies to questions of jurisdiction as well as to all other questions, and indeed that in some circumstances it applies even when the issue of jurisdiction was not litigated in the prior proceeding.[94]

It is true that the doctrine of res judicata rests upon the public interest in maintaining some degree of finality in litigation. It is also true that the latter consideration is not pertinent to the present discussion. But just as in the field of res judicata the public interest in finality of litigation led the courts to modify, and in large measure to abandon, the distinction between jurisdictional infirmities and mere error, so in the field under discussion the general public interest in vindicating the authority of the courts and in encouraging the orderly conduct of litigation may well justify judicial reconsideration of the same distinction.

[93] See particularly Boskey and Braucher, Jurisdiction and Collateral Attack: October Term, 1939, 40 Col. L. Rev. 1006 (1940); see also Res Judicata and Jurisdiction: The Bootstrap Doctrine, 53 Harv. L. Rev. 652 (1940); Judgment on Merits as Res Judicata of Jurisdiction over Subject Matter, 49 Yale L.J. 959 (1940); Rashid, The Full Faith and Credit Clause: Collateral Attack of Jurisdictional Issues, 36 Geo. L.J. 154 (1948).

[94] Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371 (1940); Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939); Stoll v. Gottlieb, 305 U.S. 165 (1938). But there are limits beyond which the courts will not go in permitting the doctrine of res judicata to cure jurisdictional infirmities. See Kalb v. Feuerstein, 308 U.S. 433 (1940); United States v. United States Fidelity & Guaranty Co., 309 U.S. 506 (1940); and comment on these decisions in Boskey and Braucher, op. cit. supra note 93.

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NOTES

OVERTIME ON OVERTIME: COLLECTIVE BARGAINING v. THE FAIR LABOR STANDARDS ACT

Another chapter in the conflict between the Supreme Court and Congress over the "correct" interpretation of the Fair Labor Standards Act has been initiated with the Court's decision in the "overtime-on-overtime" cases.[1] This

[1] Bay Ridge Operating Co., Inc. v. Aaron, 68 S. Ct. 1186 (1948).

decision on the perplexing problem of what constitutes the "regular rate of pay" for purposes of computing overtime compensation due under the Act seems destined to cause congressional repercussions similar to those which followed the Court's decision in *Anderson v. Mt. Clemens Pottery Co.*[2] Less than one year after the *Mt. Clemens* decision Congress passed the Portal to Portal Act of 1947,[3] flatly rejecting the Court's definition of "hours worked." The preamble to that Act contained a congressional warning that the Fair Labor Standards Act had been ". . . interpreted judicially in disregard of long established custom, practice and contract between employers and employees . . ."[4] which interpretation, if permitted to stand, would interfere with voluntary collective bargaining and create industrial disputes between employers and employees. Already before Congress are two bills whose passage would severely limit the effects of the present decision.[5]

The overtime controversy centers around Section 7(a) of the Fair Labor Standards Act, which provides that ". . . no employer shall . . . employ any of his employees . . . for a workweek longer than forty hours . . . unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."[6] The problem presented is the proper method of computing the regular rate of pay for longshoremen under a collective bargaining agreement between waterfront employers in the port of New York and the International Longshoremen's Association covering the years 1943–45. The annual collective agreements made with this union since 1921 have provided for a "basic working day" of eight hours and a "basic working week" of forty-four hours. Beginning in 1918, these agreements fixed two sets of hourly rates: 1) Specified hourly rates were set for work performed from 8 A.M. to 12 noon and from 1 P.M. to 5 P.M., Monday to Friday inclusive, and from 8 A.M. to 12 noon Saturday. 2) With minor exceptions, one and one-half times these rates were fixed for what the agreements called "all other time." In the fall of 1938, after the enactment of the Fair Labor Standards Act, the labels for these periods were changed to "straight time" and "overtime" respectively; but although compensation for work during the contract overtime periods continued at one and one-half times the straight time rates, no differential was provided for work in excess of forty hours in a week.[7]

Two suits were brought as class actions on behalf of all longshoremen em-

[2] 328 U.S. 680 (1946).

[3] 61 Stat. 84 (1947), 29 U.S.C.A. § 251 (Supp., 1948).

[4] Portal-to-Portal Act of 1947, 61 Stat. 84 (1947), 29 U.S.C.A. § 251(a) (Supp., 1948).

[5] S. 2728, 80th Cong. 2d Sess. (1948); H.R. 6534, 80th Cong. 2d Sess. (1948). The important provisions of these bills are found in note 50 infra.

[6] 52 Stat. 1063 (1938), 29 U.S.C.A. § 207 (1947).

[7] The straight time rates were well above the statutory minimum; they ranged from $1.25 to $2.50 an hour. For the exact provisions of the contract see 68 S. Ct. 1186, 1190 n. 5 (1948).

ployed by two stevedoring companies. An unusual alignment of interests manifested itself in this litigation. Throughout the proceedings the employers were represented by the Department of Justice, since the United States, under its cost-plus contracts with the employers covering the wartime years, was the real party in interest.[8] The validity of the collective bargaining agreements was also urged by the union itself, which opposed the bringing of these suits by a small minority of its members.

The plaintiffs maintained that their employers had violated the Act by not paying one and one-half times the "regular rate" for hours in certain workweeks in which they had worked in excess of forty hours. The employers had applied the terms of the above agreement in determining their employees' compensation. As a result, if in a given week one of the plaintiffs worked fifty hours, all within the so-called "overtime" period, he was paid for the additional ten hours at precisely the same rate per hour as for the first forty hours; that is, he received merely the contract rate—called the "overtime" rate in the contract—for the entire fifty hours. If in a given workweek he worked thirty hours during the so-called "straight time" period and twenty hours during the so-called "overtime" period, again he received merely the contract rates; that is, for the excess ten hours he received merely the contractually labeled "overtime" rate. The plaintiffs contended that their regular rate of pay under the contract for any workweek, within the meaning of Section 7 (a), was the average hourly rate arrived at by dividing the total number of hours worked for a single employer in that week into the total compensation received from that employer for the week. Thus they claimed that in weeks in which they had worked more than forty hours for one employer they became entitled by Section 7(a) to statutory excess compensation,[9] computed on the basis of that rate for all such excess hours.

The employers argued that the straight time rates were the regular rates, and that they had, therefore, with minor exceptions,[10] complied with the requirements of the Act. This argument was based on the contention that the contract overtime rates were intended to cover any earned statutory excess compensation and did cover it, because they were substantially one and one-half times the straight time rates. The district court's acceptance of the employer's position

[8] Any employer subject to liability for overtime pay as a result of the decision can recover a refund on income taxes paid for the years in question. Ruling of the Treasury Department concerning deductibility for income tax purposes of amounts paid under the Fair Labor Standards Act, 2 C.C.H. Lab. L. Serv. ¶33, 141 (1947).

[9] The phrase "statutory excess compensation" as used in this note means additional compensation required to be paid by § 7(a) of the Fair Labor Standards Act.

[10] Since the "straight time" hours totaled forty-four per week, the trial court held that where the employer failed to pay plaintiffs ". . . at a rate one and one-half times the 'straight time hourly rate' . . . for hours worked in excess of 40 during any workweek, all during straight time hours," the employer was liable for excess statutory compensation for four hours per week. Addison v. Huron Stevedoring Corp., 69 F. Supp. 956, 961 (N.Y., 1947). This portion of the decision was not appealed.

that the contract straight time rates were the regular rates within the meaning of Section 7(a)[11] was reversed by the Circuit Court of Appeals.[12] The decision of the Circuit Court was affirmed with some modification by the Supreme Court.[13]

The problem of regular rate is not one of first impression. Seven cases presenting varying aspects of it have been before the Supreme Court[14] since 1942, when the Court first faced the question. There has, however, been no clear-cut determination of the meaning of these troublesome words. In applying the words "regular rate" to diverse fact situations, the Court has taken as a general guide the major congressional objectives in enacting Section 7(a):[15] to spread employment by forcing employers to pay a higher rate to employees working beyond a statutory maximum number of hours, to compensate employees for the burden of long workweeks, and to provide stability of wages for both employer and employee.[16]

While the Court has refrained from rigidly defining "regular rate,"[17] a fairly consistent pattern has emerged in past decisions. It has been said that "[t]he regular rate by its very nature must reflect all payments which the parties have agreed shall be received during the workweek, exclusive of overtime payments. It is not an arbitrary label chosen by the parties; it is an actual fact. Once the parties have decided on the amount of wages and the mode of payment the determination of regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary 'regular rate' in the wage contracts."[18] The Court has approved a method of computation of

[11] Addison v. Huron Stevedoring Corp., 69 F. Supp. 956 (N.Y., 1947). The cases of Addison v. Huron Stevedoring Corp. and Aaron v. Bay Ridge Operating Co., Inc. were consolidated for trial by the district court.

[12] Aaron v. Bay Ridge Operating Co., Inc., 162 F. 2d 665 (C.C.A. 2d, 1947).

[13] Bay Ridge Operating Co., Inc. v. Aaron, 68 S. Ct. 1186 (1948). A petition for rehearing was filed by the Department of Justice, June 1948. 22 Lab. Rel. Rep. (Wages and Hours) 1271 (1948).

[14] 149 Madison Ave. Corp. v. Asselta, 331 U.S. 199 (1947); Walling v. Halliburton Oil Well Cementing Co., 331 U.S. 17 (1947); Walling v. Harnischfeger, 325 U.S. 427 (1945); Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419 (1945); Walling v. Helmerich & Payne, 323 U.S. 37 (1944); Walling v. Belo Corp., 316 U.S. 624 (1942); Overnight Motor Trans. Co. v. Missel, 316 U.S. 572 (1942).

[15] 81 Cong. Rec. 4893 (1937); 82 Cong. Rec. 11 (1937); 83 Cong. Rec. 9246, 9254 (1938); see also S. Rep. 884, 75th Cong. 1st Sess., at 2 (1937); H.R. Rep. 1452, 75th Cong. 1st Sess., at 14–15 (1937).

[16] See Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419, 424 (1945); Walling v. Helmerich & Payne, 323 U.S. 37, 40 (1944); Overnight Motor Trans. Co. v. Missel, 316 U.S. 572, 578 (1942).

[17] "We are asked to provide a rigid definition of 'regular rate' when Congress has failed to provide one. Presumably, Congress refrained from attempting such a definition because the employment relationships to which the Act would apply were so various and unpredictable. And that which it was unwise for Congress to do this Court should not do." Walling v. Belo Corp., 316 U.S. 624, 634 (1942); but cf. Reed, J., dissenting, ibid., at 635.

[18] Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419, 424, 425 (1945).

regular rate which calls for dividing all wages paid during a given week by the number of hours actually worked. One and one-half times this regular rate for hours employed beyond the statutory maximum equals compensation for overtime hours.[19]

The one exception to this general rule is the so-called "Belo" contract. This type of wage agreement, approved in a five-to-four decision in 1942 in *Walling v. Belo Corp.*,[20] provided for a guaranteed weekly wage for a fluctuating number of hours worked per week. In addition the parties stipulated a specified hourly rate in the contract (one-sixtieth of the weekly guarantee) with not less than one and one-half times such rate to be paid for all hours in excess of the statutory maximum, providing further that in no event should the total weekly compensation be less than the guaranteed wage. As the hourly rate was kept low in relation to the guaranteed wage, statutory overtime plus the contract hourly rate did not amount to the guaranteed weekly wage until after fifty-four and a half hours were worked. Thus, any employee who worked between forty-four (then the statutory maximum) and fifty-four and a half hours per week received no additional compensation for this overtime work, and the employer sustained no increase labor costs.[21]

The *Belo* decision appeared to substitute completely an objective of stability of weekly wages for the broader congressional aims of spreading employment and increased compensation to the employee for a long workweek.[22] It produced widespread disapproval from legal writers[23] and from judges in lower federal courts, who viewed the result as sanctioning an artificial rate contrary to the purposes of the Fair Labor Standards Act.[24] In 1944 and 1945 the Supreme Court held invalid three wage plans which fixed the regular rate in a wholly

[19] This formula was adopted by the Court in the first "regular rate" case to reach it, Overnight Motor Trans. Co. v. Missel, 316 U.S. 572 ,580 (1942). The fact situation of this case did not require the Court to make explicit in its definition that a true overtime premium was not to be included in the determination of regular rate.

[20] 316 U.S. 624 (1942).

[21] In a typical Belo contract an employee received a basic rate of 67 cents per hour and a weekly guarantee of $40. Hence, it was necessary for him to work 54⅓ hours before receiving more than the guarantee. "44 hours at 67 cents equals $29.48; 10⅓ hours at the statutory maximum rate of $1.00 (150% times 67 cents) equals $10.50; $29.48 plus $10.50 equals $39.98." Ibid., at 628 n. 5.

[22] "When employer and employees have agreed upon an arrangement which has proven mutually satisfactory, we should not upset it and approve an inflexible and artificial interpretation of the Act which finds no support in its text and which as a practical matter eliminates the possibility of steady income to employees with irregular hours." Ibid., at 635.

[23] Levy, Belo Revisited, 15 Geo. Wash. L. Rev. 39 (1947); Feldman, Algebra and the Supreme Court, 40 Ill. L. Rev. 489 (1946); Regular Rate of Pay under Section 7(a) of the Fair Labor Standards Act, 34 Calif. L. Rev. 227 (1946); Legality of Wage Readjustment Plans under the Overtime Provisions of the Fair Labor Standards Act, 13 Univ. Chi. L. Rev. 486 (1945).

[24] Asselta v. 149 Madison Ave. Corp., 156 F. 2d 139 (C.C.A. 2d, 1946); Walling v. Alaska Pacific Consolidated Mining Co., 152 F. 2d 812 (C.C.A. 9th, 1945); Walling v. Uhlman Grain Co., 151 F. 2d 381 (C.C.A. 7th, 1945).

artificial and unrealistic manner, though from a mathematical point of view similar to the plan approved in the *Belo* case.[25] However, in 1947 when the Court had an opportunity to overrule the *Belo* decision, a divided Court upheld its continued validity. This reaffirmation, in *Walling v. Halliburton Oil Well Cementing Co.*,[26] does not appear to be based primarily on the correctness of the original decision.[27] Instead, a majority of the Court adopted a view of statutory interpretation calling for hesitancy in reversing prior decisions which have proved of doubtful validity but which have resulted in public reliance upon and congressional acceptance of the rule announced. Justice Murphy, dissenting in the *Halliburton* case, felt that unless the *Belo* decision was overruled, the Court would "... be perpetuating and augmenting the unrealities and confusion which have marked the application of the doctrine of that case."[28] Such confusion is evident when it is considered that the trial court in the present case upheld the wage agreement partially in reliance on the *Belo* decision.[29] This reliance prompted the Supreme Court to point out that the *Belo* decision must be narrowly limited to agreements which contain a provision for a guaranteed weekly wage with a stipulation of an hourly rate, and that other types of agreements, whether or not the result of collective bargaining, cannot by their terms

[25] In Walling v. Helmerich & Payne, the Court invalidated a so-called "split-day plan" whereby a base hourly rate was paid for the first four hours worked each day, so long as the hours did not exceed forty a week, and the remaining hours were paid for at one and one-half times the basic rate. "The vice of the plan lies in the fact that the contract regular rate does not represent the rate which is actually paid for ordinary, non-overtime hours ...," with the result that an employee would have to work over 80 hours a week to obtain excess compensation. 323 U.S. 37, 41 (1944). A year later in Walling v. Youngerman-Reynolds Hardwood Co., the Court held invalid a wage contract calling for a basic wage of 35 cents an hour (then the minimum wage) for the first forty hours with 50% additional for overtime, plus a guarantee that the employee should receive weekly a sum figured on the basis of the amount of work done at piece rates. "Except in the extremely unlikely situation of the piecework wages falling below 35 cents an hour ...," this "regular rate" never actually controlled the wages paid. 325 U.S. 419, 425 (1945). The other wage plan which failed to meet the approval of the Court was considered in Walling v. Harnischfeger. Under this so-called "straight time plan" employees were guaranteed a basic wage, ranging for different employees, from 55 cents to $1.05 an hour, with 50% additional for overtime. Various jobs were "time studied" and a price was assigned to each job. If at the end of the week the prices earned from the various time studied jobs exceeded the base pay (as was true in 98¾% of the cases) the employee received his base pay plus the difference between the two. "A full 50% increase in labor costs and a full 50% wage premium, which were meant to flow from the operation of § 7(a), are impossible of achievement under such a computation." 325 U.S. 427, 431 (1945). An able analysis of the similarity between these three wage plans tried and found wanting under the Act and the Court-approved Belo plan is found in Feldman, Algebra and the Supreme Court, 40 Ill. L. Rev. 489 (1946).

[26] 331 U.S. 17 (1947).

[27] The concluding sentence of the Halliburton decision states, "Even if we doubted the wisdom of the Belo decision as an original proposition, we should not be inclined to depart from it at this time." Ibid., at 26 (1947); see Horack, Congressional Silence, A Tool of Judicial Supremacy, 25 Tex. L. Rev. 247 (1947).

[28] Walling v. Halliburton Oil Well Cementing Co., 331 U.S. 17, 28 (1947).

[29] Addison v. Huron Stevedoring Corp., 69 F. Supp. 956, 959 (N.Y., 1947); cf. Aaron v. Bay Ridge Operating Co., Inc., 162 F. 2d 665, 668 (C.C.A. 2d, 1947).

determine the regular rate under the Act. Obviously, the Court was embarrassed by the inconsistency of the *Belo* decision, apparently feeling that there an agreement of the parties had been permitted to supersede the usual judicial formula in a way not dissimilar to the result contended for by the defendants in the present case.

When the wage provisions in the longshoremen's agreement are considered in the light of past interpretations of regular rate, apart from *Belo*, it is evident that the contract straight time rates cannot be termed the "regular rates" for purposes of computing statutory excess compensation. The record discloses that four of the twenty plaintiffs worked no straight time hours and that their total compensation was computed at contract "overtime" rates. Thus, regardless of whether these employees worked twenty or sixty hours in a given workweek, no additional wages were paid to compensate them for the burden of work in excess of forty hours in one week.[30] This results from the fact that no definite relationship exists under the contract between the number of hours worked and the compensation received by an individual employee, as the statute requires.[31] The Court therefore concluded that ". . . the regular rate of pay must be found by dividing the weekly compensation by the hours worked *unless the compensation paid to an employee contains some amount that represents an overtime premium.*"[32]

This definition recognizes that to allow a "true overtime premium" to be included in the computation of the regular rate of pay would be to allow ". . . overtime premium on overtime premium—a pyramiding that Congress could not have intended."[33] Thus, the crucial issue in the case becomes the definition of a true overtime premium. The employers, the union, and the Government have urged that the fifty per cent additional overtime rates provided for in the contract were inserted in order to concentrate the work of longshoremen in the daytime hours and that this concentration contributed to a spread of employment in the industry, one of the congressional objectives in enacting the Fair Labor Standards Act. Furthermore, under the peculiar conditions of the industry, longshoremen often work short periods for several different employers within a single week. It was urged that the contract "overtime" provisions were better adapted in this instance to achieve the Act's objective of extra compensation for long hours than the Act itself. The Fair Labor Standards Act does not entitle an employee who works over forty hours per week for several employers,

[30] In Walling v. Youngerman-Reynolds Hardwood Co. the Court interpreted § 7(a) as requiring an increase of fifty per cent in the employer's labor cost at the end of the forty hour week and a fifty per cent premium to the employee for all excess hours. 325 U.S. 419, 423 (1945).

[31] An employee who worked 60 hours in a given week would receive by contract $37.50 ($1.87½ per hour times 20 hours) for his 20 hours of work above the statutory maximum. Another employee who merely worked 20 hours during the "overtime period," but who performed no previous work during the week, would receive identical compensation.

[32] Bay Ridge Operating Co., Inc. v. Aaron, 68 S. Ct. 1186, 1196 (1948) (italics added).

[33] Ibid., at 1197.

but not more than forty hours for any one of them, to any overtime pay. A study of wages and hours for longshoremen in the port of New York between 1932 and 1945 demonstrates that the "normal or regular working hours" coincided with the designated straight time hours.[34] Thus, there is no suggestion that the agreement mislabeled the true circumstances of the employment relationship in any unrealistic or artificial manner, and the good faith of the employer is illustrated by the fact that the union which made the contract appeared to defend it. The opposition of the International Longshoremen's Association to any decision invalidating the collective bargaining agreement stems from its anticipation of disastrous effects on an industry which has had labor peace for over thirty years.[35]

The Court, however, refused to conclude from the above facts that the contract straight time pay was the regular rate of pay and that the contract overtime pay included a true overtime premium. Although admitting that the pressure of the contract overtime rates tended to concentrate work in the daytime hours, it found that this concentration of work had no effect on the regular rate of pay of individual employees. The Court refused to consider as pertinent the question of "regular working hours," on the ground that regular working hours under a contract, even for an individual, had no significance in determining the rate of pay under the statute. Employees working twenty hours during the contract "overtime" period received the same respective compensation for these hours regardless of the number previously worked.[36] Since work was in fact done outside straight time hours, the employer could use men who had previously worked in straight time hours in contract overtime hours without additional cost. Thus, the Court found that the contract overtime pay did not actually compensate an employee for excess work but served rather as increased compensation for work during undesirable hours. In holding the contract overtime pay to be effectively a shift differential rather than a true overtime premium, the Court was uninfluenced by the size of the shift differential, fifty per cent more than the straight time rate.[37]

[34] The figures as stipulated by the parties or as found as facts by the district court are compiled in Justice Frankfurter's dissenting opinion. Bay Ridge Operating Co., Inc. v. Aaron, 68 S. Ct. 1186, 1209 n. 8 (1948).

[35] Mr. Joseph B. Ryan, president of the International Longshoremen's Association, testified before the trial court that the union was opposed to the suit ". . . as it might wipe out all of the gains we had made for our men over a period of 25 years." Addison v. Huron Stevedoring Corp., 69 F. Supp. 956, 958 (N.Y., 1947). After the Supreme Court invalidated the overtime provisions of the contract in the present case, the union found it necessary to bargain for a 50 cent an hour wage increase, since the employers were unwilling to pay the "overtime" rates to any employee not previously performing forty hours' work in a given workweek. N.Y. Times, § 2, p. 41, col. 2 (July 13, 1948). The breakdown of these wage negotiations led to a threatened strike of all East Coast longshoremen. On President Truman's order, the Attorney General secured an injunction under the "national health or safety" provision of the Labor Management Relations Act of 1947, 61 Stat. 140 (1947), 29 U.S.C.A. § 208(a) (Supp., 1948).

[36] Note 31 supra.

[37] The district court's Finding of Fact 28, as cited by the Supreme Court, states that a shift differential ". . . is an amount added to the normal rate of compensation which is large

A true overtime premium was defined as ". . . any additional sum received by an employee for work because of previous work for a specified number of hours in the workweek or workday whether the hours are specified by contract or statute."[38] Only a premium paid under these conditions may be deducted from the total weekly compensation in computing the regular rate of pay.[39] This definition of "overtime premium" is the most controversial part of the Court's decision. It has become a widespread practice in industry to pay time and one-half or double time for all work performed on Sundays and holidays without taking this additional pay into consideration in computing an employee's regular rate of pay.[40] Thus the decision casts a shadow of illegality over this practice under contracts in many other industries. Prior to the present decision, the Administrator of the Wage and Hour Division had interpreted the Act so as to sanction the exclusion of Sunday and holiday pay from the computation of regular rate.[41] This construction was based on the importance attributed to work performed outside of "normal or regular working hours."[42] Since the Court has held that regularity of working hours has no significance in

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enough to attract workers to work during what are regarded as less desirable hours of the day, and yet not so large as to inhibit an employer from the use of multiple shifts. A safe guide for distinguishing between the shift differential and the overtime premium is by the degree of spread between the normal rate and the penalty rate. Whereas a shift differential is usually 5 or 10 cents per hour, the overtime premium is generally 50% of the normal rate." Bay Ridge Operating Co., Inc. v. Aaron, 68 S. Ct. 1186, 1209 (1948). Compare the Directives of the Economic Stabilization Director dated March 8, 1945 and April 24, 1945, limiting the shift differentials which the National War Labor Board could approve to four cents per hour for the second shift and six or eight cents an hour for the third shift. 1A C.C.H Lab. L. Serv. ¶¶ 10,034.11, 10,462 (1945); 1944–1945 Wage & Hour Manual (cum. ed.) 1468.

[38] Bay Ridge Operating Co., Inc. v. Aaron, 68 S. Ct. 1186, 1201 (1948).

[39] Under this definition, the following could clearly not be applied to overtime pay due under the Act: 1) premium rates paid for night work or any other special shift; 2) premium rates paid for particular jobs such as those which are hazardous or undesirable for other reasons; 3) premium rates paid for work on holidays, as such; 4) premium rates paid for work on Saturday or Sunday, as such. The following, however, appear to satisfy the definition of an overtime premium and thus could be credited against overtime due under the Act: 1) premium rates paid for work in excess of eight or some other specified number of hours during a work day; 2) premium rates paid for work in excess of 36, 40, 48, or some other specified number of hours in a workweek; 3) premium rates paid for work on the sixth or seventh consecutive day of the week (such a premium would presumably be for work in excess of a specified number of hours a week); 4) premium rates paid for Saturday or Sunday work if the employee is required to work a specified number of hours before Saturday or Sunday in order to be eligible for the premium.

[40] 65 Monthly Labor Rev. 183, 419 (1947).

[41] 1944–1945 Wage and Hour Manual (cum. ed.) 170, 227; cf. Wage and Hour Division, Interpretative Bulletin No. 4, issued Nov. 1938, revised Nov. 1940; 1944–1945 Wage and Hour Manual (cum. ed.) 167.

[42] ". . . in determining whether he has met the overtime requirements of Section 7 the employer may properly consider as overtime compensation paid by him, for the purpose of satisfying these requirements, only the extra amount of compensation—over and above straight time—paid by him *as compensation for overtime work—that is, for hours worked outside the normal and regular working hours*. . . ." Wage and Hour Division, Interpretative Bulletin No. 4 § 69, op. cit. supra note 41.

determining the overtime pay required by statute, the Wage and Hour Division has revised its past interpretation and advised employers to conform their present and future wage plans to the Court's decision.[43] It has been predicted that the Court's refusal to classify these large differentials as true overtime premiums will result in the imposition of substantial liability upon employers, but this prediction seems to rest on an inadequate consideration of the "safeguards" of the Portal to Portal Act of 1947.[44] The Act will limit severely the retroactive effects of the decision. Most employers should be able to prove with little difficulty that their practice of excluding extra pay for Sundays and holidays from the computation of regular rate was based in good faith on the past interpretations of the Wage and Hour Division.[45] Such reliance, if pleaded and proved, will serve as a complete defense to any action to recover excess statutory compensation.[46] This defense will eliminate a substantial portion of the financial liability imposed on employers as a result of the decision.[47] Any employee claim

[43] The new interpretation by the Wage and Hour Administrator of a true overtime premium, although generally in accord with the Court's decision, appears to be questionable in one particular. It states that ". . . a contract may provide for payment of time and one-half compensation for Saturday work, and also for overtime compensation at the same rate for hours worked in excess of 40 in the week or in excess of any bona fide daily or weekly contractual standard. In such a situation, where it appears that Saturday work normally falls within the contractual overtime hours, this will ordinarily be a sufficient showing that time and one-half paid for work on Saturday during the contractual overtime hours is actually paid because of excessive hours of work. In such event the 50% premium . . . need not be included in the regular rate. . . ." 22 Lab. Rel. Rep. (Wages and Hours) 3083, 3085 (1948). This interpretation of premium pay with a "double aspect" is open to the objection that it allows an employer to work an employee on Saturday, even though the employee has previously performed forty hours of work in the week, without increasing the employer's labor costs, because any other employee would have to be paid the same wages for Saturday work. Compare Bay Ridge Operating Co., Inc. v. Aaron, 68 S. Ct. 1186, 1200 (1948). Because so many employers and unions have indicated that they would need more time to conform their overtime pay practices to the new requirements set by the Supreme Court, the Wage and Hour Division postponed enforcement of the new rules until September 15, 1948. 22 Lab. Rel. Rep. (Wages and Hours) 1278 (1948). This postponed enforcement in no way affects the rights of employees to bring suit for overtime compensation for Sunday or holiday work.

[44] The effects of the Portal-to-Portal Act of 1947 on the Fair Labor Standards Act are analyzed in Fair Labor Standards under the Portal to Portal Act, 15 Univ. Chi. L. Rev. 352 (1948).

[45] For example, note Wage and Hour Division Interpretations cited in notes 41 and 42 supra.

[46] No employer shall be subject to any ". . . liability or punishment [under the Fair Labor Standards Act] for or on account of the failure of the employer to pay minimum wages or overtime compensation . . . if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval or interpretation . . . of the Administrator of the Wage and Hour Division of the Department of Labor." Portal-to-Portal Act of 1947, 61 Stat. 89 (1947), 29 U.S.C.A. § 259 (Supp., 1948).

[47] Prior to the Circuit Court of Appeals decision in the present case, 118 suits had been instituted on behalf of longshoremen, and up to June 1948, approximately 100 new complaints had been filed. 68 S. Ct. 1186, 1191 (1948). It has been estimated that liability on longshoremen's contracts alone might run as high as $300,000,000. Hearings before Subcommittee No. 4 of the House Committee on Education and Labor, 80th Cong. 1st Sess., at 1198, 2469 (1947).

not barred by the "good faith" provisions of the Portal Act will be subject to the two year statute of limitations, now a part of the Fair Labor Standards Act.[48] To further mitigate the effects of the Court's definition of an "overtime premium," two identical bills are before Congress to obtain revision of the Fair Labor Standards Act's overtime provisions.[49] These measures operate to deprive the courts of jurisdiction over certain types of overtime pay suits in a manner reminiscent of the Portal to Portal Act. The heart of these proposals is contained in the section defining an "overtime premium" which may be credited against overtime pay due under the Fair Labor Standards Act.[50] The effect of the enactment of this proposed legislation would be to nullify completely the Court's definition of "overtime premium," thus severely limiting the "spread work" philosophy of the Fair Labor Standards Act.

Rarely has the Supreme Court invalidated a wage agreement supported by both management and labor. This peculiar alignment of interests brings squarely into focus the role of collective bargaining in relation to wage and hour standards. Although the Court has recognized that the Fair Labor Standards Act was enacted primarily ". . . to aid the unprotected, unorganized and lowest paid of the nation's working population . . . ,"[51] in the present case it rejected any argument that an agreement reached or administered through collective bargaining by a strong and powerful union ". . . is any more persuasive in defining regular rate than individual contracts."[52] Perhaps the difficulty of the present situation points to a conflict between two of our basic labor policies. The Wagner Act[53] looks toward harmonious labor relations by encouraging a union of all economic forces in an industry through collective bargaining. "Unless the collective agreement is held to determine the incidents of the employment of the entirety for whom it was secured . . . ," Justice Frankfurter declared in his dissent, ". . . it ceases to play its great role as an instrument of industrial democracy."[54] The Fair Labor Standards Act, on the other hand, was

[48] Portal to Portal Act of 1947, 61 Stat. 85 (1947), 29 U.S.C.A. § 255 (Supp., 1948).

[49] Note 5 supra.

[50] Section 4 of the two identical bills provides: "(a) The term 'overtime premium' means that portion of any overtime rate that is paid because the employee has previously worked a specified number of hours during a specified period or because of the time of the day or the day of the week or year the work is performed. (b) The term 'overtime rate' includes any rate of at least one and one-half times any lower rate, not proved to be a fictitious rate, established by custom or individual labor contract, payable for the same work at other hours of the day or on other days and includes any other true overtime rate." S. 2728, 80th Cong. 2d Sess. (1948); H.R. 6534, 80th Cong. 2d Sess. (1948); see 22 Lab. Rel. Rep. (Wages and Hours) 1267, 1268 (1948).

[51] Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 707 n. 18 (1945).

[52] Bay Ridge Operating Co., Inc. v. Aaron, 68 S. Ct. 1186, 1196 (1948).

[53] National Labor Relations Act, 49 Stat. 449 (1935), 29 U.S.C.A. § 151 (1947).

[54] Bay Ridge Operating Co., Inc. v. Aaron, 68 S. Ct. 1186, 1211 (1948). A vigorous argument that a collectively obtained and administered agreement should be effective in determining the regular rate of pay is presented in the amicus curiae brief filed by the International Longshoremen's Association; see ibid., at 1196 n. 19 (1948).

enacted to protect the working conditions of individual employees, and in interpreting the Act the Court has always tested the effect of a contract from the point of view of the individual rather than from the point of view of the industry as a whole.[55] This conflict comes to the fore particularly in a case like the present one, in which the industry agreement works to the detriment of a small minority of union members.

Justice Frankfurter, speaking for a minority of the Court, characterized the present decision as ". . . heedless of a long-standing and socially desirable collective agreement . . . calculated to foster disputes in an industry which has been happily at peace for more than thirty years. . . ."[56] Pointing to the fact that Congress left undefined the words "regular rate" in contrast to its explicit definition of thirteen other phrases used in the Act, he concluded that ". . . the 'regular rate' in a given industry must be interpreted in the light of the customs and practices of that industry."[57] He refused to admit that a contract entered into by a powerful union, familiar with the needs of its members and the peculiar conditions of the industry, should not be persuasive in setting a "regular rate" for the industry. If employers and employees cannot by contract fix a regular rate suited to the needs of a particular industry, their attempt, when "squared" with the provisions of Section 7(a), may produce results which neither party contemplated and which both oppose. The emergence of such a result from the present decision is evidenced by the fact that less than one month after the decision was handed down the Department of Justice filed a petition for rehearing before the Court.[58] This petition states, in part, that the Court's insistence that weekend and holiday pay must be considered as part of the regular rate, thus increasing statutory overtime pay, will result in a ". . . wage increase that many employers cannot afford, which so far the unions are not seeking, and which in our opinion, Congress had no thought of imposing."[59]

The reasoning of Justice Frankfurter's opinion would require that an exception be read into the terms of Section 7(a) excluding from the overtime requirements of the Act an agreement reached through the process of collective bargaining, provided that the regular rate is not computed in a wholly unrealistic and artificial manner. The statute does partially exempt from the overtime provisions those collective bargaining agreements which stipulate either an annual or a semi-annual wage.[60] Perhaps it would be more in accord with "industrial reality" to follow Justice Frankfurter's opinion. However, it has never been envisioned as the role of the courts in interpreting legislation to bring specific provisions of a congressional enactment "up to date." The charge of

[55] Cases cited note 14 supra.

[56] Bay Ridge Operating Co., Inc. v. Aaron, 68 S. Ct. 1186, 1203 (1948).

[57] Ibid., at 1206.

[58] 22 Lab. Rel. Rep. (Wages and Hours) 1271 (1948).

[59] Ibid., at 1273.

[60] 52 Stat. 1063 (1938), as amended 55 Stat. 756 (1941), 29 U.S.C.A. § 207(b) (1947).

"judicial legislation" has been leveled at less obvious and calculated decisions of the Court. Ten years of experience under the Fair Labor Standards Act have demonstrated that some of its provisions require revision. The minimum wage of forty cents an hour, for example, is clearly not in accord with our present financial structure.[61] But if the present decision is out of line with the best interests of the nation today, the fault is with the statute, not the Court; and the agency to effect a change is the Congress.

GOVERNMENTAL IMMUNITIES—A STUDY IN MISPLACED SOLICITUDE

There cannot be a stronger proof of that genuine freedom, which is the boast of this age and country, than the power of discussing and examining, with decency and respect, the limits of the king's prerogative. A topic, that in some former ages was thought too delicate and sacred to be profaned by the pen of a subject. It was ranked among the secrets of the empire and, like the mysteries of the good goddess, was not suffered to be pried into by any but such as were initiated in its service: because perhaps the exertion of the one, like the solemnities of the other, would not bear the inspection of a rational and sober inquiry.

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Although the nation's judiciary has transplanted the king's prerogative in the United States under the name of government immunities, a recent case before the Supreme Court fails to give evidence that the enlightened approach to the subject which prevailed in the era of the Great Commentator has taken root here.

On a 1945 contract between Merrill, an Idaho farmer, and the Federal Crop Insurance Corporation, the latter refused to pay for the loss of Merrill's wheat crop because the acreage involved was not insurable according to the government corporation's regulations.[1] The local agent, to whom Merrill had given full details concerning the nature of the crop, had assured him that his crop was insurable. On the strength of this information Merrill planted his crop and refrained from taking out other insurance.[2] The application blank required no description which would have shown that the crop involved was spring wheat reseeded on winter wheat acreage, a fact which would have revealed to an agent with knowledge of the regulations that the crop was not insurable. Accordingly, the application for insurance was approved in routine fashion upon being submitted by the local agent in Idaho to the regional office in Denver. The regional office forwarded to plaintiff an acceptance stating: "The insurance contract consists of the accepted application and the Wheat Crop Insurance Regula-

[61] Embodied in the message of the President to Congress accompanying his approval of the Portal-to-Portal Act of 1947 was a recommendation that the minimum wage be raised to at least 65 cents an hour. H.R. Doc. 247, 80th Cong. 1st Sess. (1947).

[1] Wheat Crop Insurance Regulations, Sec. 414.1, 10 Fed. Register 1586 (1945).

[2] Merrill's brief in the Idaho Supreme Court at 22, 26 (1946).

tions, copies of which are enclosed. We suggest that you carefully read the provisions of your contract."[3] However, evidence was admitted to show that no copy of the regulations was enclosed.

The FCIC conceded that plaintiff did not receive actual notice of the regulations but insisted that the Federal Register Act, which makes publication of regulations in that journal notice "to all persons affected by them," had discharged its duty to give notice when the rules in issue were so published.[4] The FCIC further contended that once it had fulfilled that obligation it was not bound by rules of estoppel which would have been operative had the insurer been a private insurance corporation. The Idaho Supreme Court could not agree with this point of view and held the government corporation estopped because it was conducting a "proprietary insurance business."[5] But the United States Supreme Court, speaking through Justice Frankfurter, reversed that decision, five to four, in *Federal Crop Insurance Corporation v. Merrill*.[6]

The language of the brief decision agrees emphatically with the FCIC argument: The government does not become bound by rules of liability applicable to a private activity, either because it is engaged in a proprietary rather than a governmental function or because it assumes the corporate form rather than the form of conventional executive agencies and bureaus. Although the decision becomes somewhat obscure on the next point, it seems that the majority proceeds on the theory that the Court may not impose liability upon the United States in this situation without a congressional declaration that the unit it has created is not to enjoy some or all of the immunities traditionally accorded agencies of government.[7] Having foreclosed all inquiry along the latter lines, Justice Frankfurter made an affirmative statement of the doctrine of governmental immunity as it applies to the instant case: He who deals with the government (and the government acts only through its agents) "takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bound of his authority."[8]

To concede that an activity is a governmental one conducted by an agent of the government is to place it in a company entitled to a goodly number of immunities. These are commonly held to comprise freedom from suability, freedom from the application of the rules of laches and estoppel, freedom from the effects of statutes of limitations, and also certain procedural advantages arising out of claims sounding in tort and contract. It is understandable why the Su-

[3] FCIC brief in the Supreme Court of the United States at 6 (1947).

[4] Federal Register Act, 49 Stat. 502 (1935), 44 U.S.C.A. § 307 (Supp., 1947).

[5] Merrill v. Federal Crop Insurance Corp., 174 P. 2d 834, 836 (Idaho, 1946).

[6] 332 U.S. 380 (1947).

[7] This notion is most strongly expressed in a footnote in the decision: "The rules of law whereby private insurance companies are rendered liable for the acts of their agents are not bodily applicable to a government agency like the Corporation, unless Congress has so provided." Ibid., at 383 n. 1.

[8] Ibid., at 384.

preme Court in the *Merrill* case disagrees with one who points to the twin aspects of corporate form and commercial purpose which a governmental activity may possess in order to demonstrate that it should not enjoy an immunity. A governmental unit designated a "corporation" by Congress is a unique kind of agency possessed of a misleading name. A typical example of the wide deviation from private corporate structure in these agencies may be found in the Federal Crop Insurance Act.[9]

The FCIC enjoys the franking privilege[10] and immunity from taxation.[11] It may use the facilities of any governmental activity in carrying out its work.[12] Its capital stock of $100,000,000 is free of the burden of administrative expenses which are covered by a maximum annual $12,000,000 appropriation.[13] At the time of the contract in question in this case, part of the program was characterized as "experimental,"[14] and at present an economy-minded Congress has put the entire program on an experimental basis.[15] In eight years the cost to the government has been $100,000,000 in excess of premiums received.[16] Further differences may be pointed out, but the above should suffice to demonstrate the futility of basing liability on an argument which proceeds from form.

Selection of the corporate form, especially in the nineteen thirties, provided psychological advantages and made possible constant revision of the methods and scope of activity of agencies through procedures unusual for government at that time. It particularly avoided the delays which would have been engendered if approval by the Comptroller General had been required for expenditures covering the ever-changing categories of home loans, insurable crops, and businesses eligible for government credit.[17] It has been suggested that the corporate form was popular because some units could, by using that form, remain free from the whims of Congress, since the money necessary to existence did not come from annual appropriations but from a sum derived from "sale" of capital stock to the government.[18] Subsequent to the era of rapid proliferation of government corporations, however, Congress destroyed most of these advantages through the enactment of the Financial Control of Government Corporations

[9] 52 Stat. 72 (1938), 7 U.S.C.A. § 1501 (1939).

[10] 52 Stat. 73 (1938), 7 U.S.C.A. § 1506 f (1939).

[11] 52 Stat. 75 (1938), 7 U.S.C.A. § 1511 (1939).

[12] 52 Stat. 73 (1938), 7 U.S.C.A. § 1506 g (1939).

[13] 55 Stat. 255, 256 (1941), 7 U.S.C.A. § 1516 (Supp., 1947).

[14] 58 Stat. 918 (1944).

[15] 61 Stat. 550 (1947), 7 U.S.C.A. § 1506 a (Supp., 1947).

[16] H.R. Rep. 450, 80th Cong. 1st Sess., at 32–33 (1947).

[17] United States ex rel. Skinner and Eddy Corp. v. McCarl, 275 U.S. 1, 8 (1928); McDiarmid, Government Corporations and Private Funds, 31 Am. Pol. Sci. Rev. 1094 (1937); The Corporation as a Federal Administrative Device, 83 U. of Pa. L. Rev. 346, 356 (1935).

[18] McDiarmid, op. cit. supra note 17. The FCIC relies upon annual appropriations for administrative expenses. Note 13 supra.

Act.[19] At present the Comptroller General has auditing control together with power to deliver opinions on the legality of expenditures. All wholly owned government corporations must submit a detailed annual budget to Congress.[20] In addition, a recent amendment to the Act gives Congress power to control expenditure of corporate funds directly.[21]

If a litigant turns to the accompanying contention that a government corporation is engaged in a typical private activity and should therefore be bound by the rules of the market place, the reply will be that this does not alter the fact that it remains "an agency selected by the Government to accomplish purely Governmental purposes."[22] Whenever created, government corporations were justified as needed in wartime or in an economic crisis,[23] or as providing a facility that private enterprise would not undertake to furnish, typical of which is crop insurance against all types of losses.[24]

At this point the basic issue of the case is uncovered. For one must begin a search for the reasons supporting the argument that, regardless of the type of activity involved, governmental agencies are entitled to all traditional immunities. The ancient wheeze about the royal prerogative and the assumption that he who makes the laws does not violate them is no longer deemed a reason for the immunities, but is at most a reference to their historical origin.[25] The reasons advanced for invoking an immunity may be reduced to an assertion that the government deals with formidable problems under severe administrative handicaps, making necessary this special protection without which great losses to the public and severe restrictions upon essential activity of the state would follow. The arguments run that the government has a multitude of things in its care which it is hard pressed to manage because of the lack of personnel and funds, the fragmentation of its agencies, the fact that the cost of guarding such things as public land would be prohibitive, and (a judicial prejudice that is implicit in some decisions) the incompetence and negligence of some governmental officials.[26]

There are significant exceptions to the application of immunity rules. Laches will be a bar when the government presses a suit for recovery of land long settled

[19] 59 Stat. 597 (1945), 31 U.S.C.A. § 841 (Supp., 1947).

[20] 59 Stat. 598, 599 (1945), 31 U.S.C.A. §§ 847, 851 (Supp., 1947).

[21] 61 Stat. 584 (1947), 31 U.S.C.A. § 849 (Supp., 1947).

[22] Cherry Cotton Mills, Inc. v. United States, 327 U.S. 536, 539 (1945).

[23] Keifer and Keifer v. Reconstruction Finance Corporation, 306 U.S. 381, 390 (1939); McDiarmid, op. cit. supra note 17, at 1096, 1097.

[24] FCIC v. Merrill, 332 U.S. 380, 383 n. 1 (1947).

[25] 1 Bl. Comm. *237–82; H. F. Pinney, The Legal Status of Federal Government Corporations, 27 Calif. L. Rev. 712, 714 n. 14 (1939).

[26] Guaranty Trust Co. v. United States, 304 U.S. 126, 133 (1938); United States v. Thompson, 98 U.S. 486, 489, 490 (1878); United States v. Kirkpatrick, 9 Wheat (U.S.) 720, 735 (1824); Lee v. Munroe and Thornton, 7 Cranch (U.S.) 366, 368 (1813); Maine, Ancient Law 31 et seq. (10th ed. 1930).

and improved.[27] When a party to commercial paper, the United States is on a par with all other holders,[28] except that the application of this rule is to be left to the federal judiciary.[29] The exception is significant because of the courts' power to substitute for the state interpretations of the law of negotiable instruments either its own current theories or the commercial law developed under *Swift v. Tyson*.[30] Further, when the government brings a bill in equity, the court will hold it estopped if it would be grossly unfair to permit the party who misled the defendant to initiate an action founded on the defendant's honest but mistaken reliance.[31] Successively, the establishment of a Court of Claims,[32] the Tucker Act,[33] and the Federal Tort Claims Act[34] have made possible direct judicial action in tort and contract against the government. In England and the Dominions the power to sue the government is accorded individuals through the Petition of Rights.[35] Actions for the redress of negligent and unauthorized acts of government officials, as well as the assertion of rules of laches and estoppel against the government, have long been allowed on the Continent.[36]

Both the judicial exceptions to governmental immunities and the statutes permitting suit where immunities formerly precluded action are based on notions of procedural convenience and fairness. Opposition to the root concepts which supposedly justify the application of immunity rules has stemmed from the same grounds of fairness. At least one international conference has recommended that free trade be served by according no immunities to government agencies employed in commercial enterprises.[37] The United States government, which has been described as "the world's biggest business,"[38] is now relied upon to provide important services hired for value by parties ranging from the well-counseled corporation to the legally inept home builder or farmer. A quarter of a century ago, when this trend had scarcely begun, the unfairness of indiscriminate application of the immunities was condemned:

[27] Iowa v. Carr, 191 Fed. 257 (C.C.A. 8th, 1911); United States v. Stinson, 125 Fed. 907 (C.C.A. 7th, 1903), aff'd 197 U.S. 200 (1905).

[28] "The United States does business on business terms." United States v. National Exchange Bank, 270 U.S. 527, 534 (1926); Cooke v. United States, 91 U.S. 389, 396, 398 (1875); The Floyd Acceptances, 7 Wall. (U.S.) 666 (1868).

[29] Clearfield Trust Co. v. United States, 318 U.S. 363 (1943).

[30] 16 Pet. (U.S.) 1 (1842).

[31] Walker v. United States, 139 Fed. 409, 413 (D.C. Ala., 1905); United States v. Stinson, 125 Fed. 907, 910 (C.C.A. 7th, 1903), aff'd 197 U.S. 200 (1905). The problem has been considered in the light of the instant case. 16 Geo. Wash. L. Rev. 273, 274 (1948).

[32] 10 Stat. 612 (1855). [33] 24 Stat. 505 (1887).

[34] 60 Stat. 843 (1946), 28 U.S.C.A. §§ 921 et seq. (Supp., 1947).

[35] Crown Companies and Civil Liability, 22 Can. Bar J. 927, 930 (1944).

[36] Borchard, Government Liability in Tort, 34 Yale 1, 2 (1924).

[37] Ownership of Stock by Foreign Government as Affecting Amenability to Suit, 42 Harv. L. Rev. 1078 (1929), citing 1 World Economic Conference 35 (League of Nations, 1927).

[38] $8 Billion Dollar Day, 52 Time, No. 2, at 15 (July 12, 1948).

The hazards run by the administrative officer who may have acted in perfect good faith, and by the private individual . . . manifest defective social engineering . . . hardly creditable to an enlightened community. . . . It requires but a slight appreciation of the facts to realize that in Anglo-American law the individual is left to bear all the risks of a defective, negligent, perverse or erroneous administration of the State's functions, an unjust burden which is becoming graver and more frequent as the Government's activities become more diversified and as we leave to administrative officers in even greater degree the determination of the legal relations of the individual citizen. . . . [But] there seems no sound reason why the English-speaking countries, where the public service is usually in less professional hands than on the continent, should not adopt modern social and legal principles in determining the legal relations between the government in its administration of the public services, the officers and agents whom it employs for this service, and the individual members of the community.[39]

It is difficult to imagine a more effective way to arrest the evolution of "social and legal principles" leading to a discriminating use of government immunities than by way of the majority position in the *Merrill* case. Although the Supreme Court took the salutary step of rejecting the form and commercial purpose argument, some equivocal statements leave the impression that it dismissed the possibility of valid alternative arguments by declaring itself powerless to determine the scope of the estoppel immunity without explicit directions from Congress. The justification for this conclusion seems to be that judicial initiative in the matter would be judicial "legislation." Yet a consideration of the line of precedent relied upon to uphold the "estoppel" immunity in the *Merrill* decision casts considerable doubt upon the assumption that this immunity is so irrevocably fixed upon the law as to make mandatory its a priori application by the judiciary. Instead, these decisions reveal that the doctrine is judge-made, that it has arisen in cases where the elements of a true estoppel are actually missing, and that all too often the immunity enters a case as a makeweight or weak alternative ground of decision.

If a branch of estoppel is involved here, it is not that founded on a judicial record or deed. Rather it is the notion of equitable estoppel or estoppel in pais.[40] The concept has been variously defined. When operative it denies, in the interests of equity and justice, the right of a party to plead an "admittedly true fact." Equitable estoppel operates only where there has been a positive representation or act done with serious purpose, the consequence of which is justifiable reliance and action by the other party to his detriment, founded on ignorance of the true state of affairs behind the representation (which may have been made in good faith, or in ignorance when there was a duty to be informed).[41]

[39] Borchard, Government Liability in Tort, 34 Yale L. J. 1, 2, 3 (1924).

[40] Everest, The Law of Estoppel 1–15 (1907).

[41] 3 Pomeroy, Equity Jurisprudence 191 (1941); Bigelow, The Law of Estoppel 570 (1890); 1 Herman, Law of Estoppel 6 (1886).

The facts of this case need not be strained to find an estoppel situation. Merrill relied upon the assurances of the local and regional agents of the FCIC and received no actual notice of the rules declaring his crop uninsurable. Accordingly, he refrained from getting other insurance.[42] Further, he appears to have based his decision to take the risk of reseeding the winter-killed acreage on the assumption that the crop was insurable.[43] Reliance, change of position, and consequent detriment are all present.

Despite these facts and despite the framing of all previous decisions and briefs in terms of estoppel theory, the word "estoppel" appears at no point in the *Merrill* decision. If these previous arguments are faulty, the majority takes no pains to demonstrate the error. The underlying premise may be that this is not an estoppel situation at all: that plaintiff suffered no detriment. If that is true, the case is governed by another immunity which flatly asserts that no citizen may rely upon the apparent authority of government officials whatever the circumstances.[44]

The cases supporting the latter immunity lie in the same twilight zone as the cases which employ the rationale of estoppel. The two lines of decision are intermingled in that one is cited to support the other; at times they unite to form alternate grounds for a decision. In fact they may well coincide, since the cases disclose that the Supreme Court has seldom dealt with a true estoppel situation. Thus, it may be better to say that the essence of the *Merrill* decision is that estoppel cannot become operative against the government because reliance on apparent authority, if that authority does not exist in fact, can never be justifiable reliance.

Whatever his purpose in skirting the magic word, Justice Frankfurter is stating the logical consequences of the theory that a private citizen has no right to evoke the doctrine of estoppel or rules governing apparent authority of agents against a unit of the government. That being so, the citizen is charged with the duty of knowing the applicable regulations; he "takes the risk of having accurately ascertained that he who purports to act for the Government stays

[42] "[H]ad the plaintiffs had the slightest idea that the defendant insurance company was not insuring their crop, they most certainly would have procured insurance from other companies. . . ." Merrill's brief in the Idaho Supreme Court at 31 (1946).

[43] Application was made on March 26, 1945. Seeding took place "in March and April." At the time Merrill applied, a witness present in the county agent's office described a portion of the interview as follows, "It was discussed among the group there what kind of spring wheat it would be better to sow on this winter-killed grain." Merrill's Brief at 22, 4, 26. Whether or not the Supreme Court knew these facts or whether they were emphasized in oral arguments is conjectural. In the same vein it may be noted that the court did not take judicial notice of the fact that Merrill was a lawyer, nor did it note that as a farmer he should have known that on newly-broken sage brush land in an Idaho dry farm area, the winter wheat crop would remove so much moisture from the soil that failure of the spring wheat crop would be a foregone conclusion. It should be kept in mind that the majority states, "And so we assume that recovery could be had against a private insurance company." FCIC v. Merrill, 332 U.S. 380, 383 (1947).

[44] Sutton v. United States, 256 U.S. 575 (1921); Bradley v. United States, 98 U.S. 104 (1878); Whiteside v. United States, 93 U.S. 247 (1876).

within the bounds of his authority."[45] No amount of semantic acrobatics can alter the fact that if an equitable rule of fairness identical with or akin to estoppel could be invoked against the government, the citizen's duty to be a research expert in governmental organization and procedure would cease; he could treat the government as a private organization and justifiably rely upon the front (acts done within the scope of the apparent authority of agents) which it presents to the public.

Decisions invoking the estoppel and apparent authority immunities are commonly justified by citation of a well-worn line of decisions. The first and only case before the Supreme Court to involve a clear estoppel situation was *Lee v. Munroe and Thornton*[46] wherein officials of the District of Columbia misled Lee as to the status of land claims against the District held by his debtor. Lee parted with his notes in exchange for a worthless claim. The rationale offered in this case—that an official's incaution and mistake would lead to large losses of public land—is the only one ever offered by the Supreme Court in estoppel immunity cases.

The Floyd Acceptances,[47] cited by Mr. Justice Frankfurter in the *Merrill* case, did not rely on an immunity. It applied the then current theory that any holder in due course must satisfy himself that the issuing agent acted within the scope of his authority.[48] *Filor v. United States*[49] was, on the other hand, primarily devoted to the question of jurisdiction of the Court of Claims over wartime seizures. It was utterly devoid of justifiable reliance by the plaintiffs, Confederate owners suing on a "lease" executed by Union officers ordered to seize the property. In fact, the plaintiffs' knowledge of the actual status of the property precluded the possibility of even a modicum of reliance.

Hawkins v. United States[50] and *Pine River Logging Company v. United States*[51] are alike in that plaintiffs sought to justify their deviation from explicit terms in written contracts. In the *Hawkins* case, a quarry operator bid for and was awarded the stone contract for a post office which stipulated that variations from the contract had to be authorized in writing by the Secretary of the Treasury. Although plaintiff failed to protest the acts of an independent contractor who rejected his first load of stone and demanded stone of a higher quality, he felt free to sue the government for the value of the costlier stone supplied. In the *Pine River* case plaintiffs solemnly asserted that they had relied upon apparently collusive directions given by a government "supervisor" who allowed the defendants to cut 17,000,000 board feet of lumber on a 2,000,000 board feet contract.

In *Utah Power and Light Company v. United States*,[52] also cited in the *Merrill* decision, the Court was asked to believe that a several million dollar power in-

[45] FCIC v. Merrill, 332 U.S. 380, 384 (1947).
[46] 7 Cranch (U.S.) 366 (1813).
[47] 7 Wall. (U.S.) 666 (1868).
[48] Ibid., at 676.
[49] 9 Wall. (U.S.) 45 (1869).
[50] 96 U.S. 689 (1877).
[51] 186 U.S. 279 (1901).
[52] 243 U.S. 389 (1917).

vestment was made in facilities erected on public land in reliance upon an undocumented agreement with "unmentioned officers or agents of the United States."[53] A recitation of the apparent authority and estoppel immunity rules is to be found in *Wilber National Bank v. United States*,[54] in which the Court also went out of its way to point out that the elements of estoppel and justifiable reliance upon apparent authority were absent, since plaintiff was not misled by any assertions of the government. It is in some respects like the *Merrill* case (and is therein cited), except that the insured was plainly told on the policy he received that he had to submit a certificate of insurability together with full payment of all arrearages.

United States v. Stewart[55] involved certain investors in depressed farm loan bonds who argued that all gains on the bonds were tax exempt because, among other things, the government agency interested in the sale of the bonds had issued circulars saying that the bonds and their income were free from taxation. The Supreme Court noted the trial court's finding that the plaintiffs had reasonably relied upon the statements in the brochures, but apparently had a hard time in swallowing that finding. It prefaced its discussion of the agent's authority with this clause: "Aside from the fact that these statements are hardly more specific than the statute itself. . . ." It is also apparent that the investors well knew that these vague statements were not made by treasury agents.

The litigation in *United States v. City and County of San Francisco*[56] grew out of the fact that the municipality had breached a condition of a contract made in 1913, granting it the use of public lands for power and water development, by reselling the power produced to private distributors. Not until the violent political and economic changes of the thirties did the Department of the Interior take notice of the breach. In this situation, ringing with political overtones, the city and power companies professed profound ignorance of the political facts of life and argued that rules of estoppel should apply. The court tactfully pointed out that their conduct had not been sanctioned but merely tolerated. Estoppel is a makeweight; the majority was content to say that "it is enough to repeat" the formula in the *Utah Power* case.[57]

All but one (and that nearly a century and a half old) of these cases are thus lacking in one or the other of the elements necessary to an equitable estoppel, usually because of the impossibility of finding apparent authority and its consequence, justifiable reliance. Were it possible to frame each of these situations in reference to private parties, it would be said in each case that equity's office would be abused by a finding that those who invoked estoppel were justified in relying as they did upon the agents' words and deeds. Yet this tottering line of

[53] Ibid., at 408. In this and the Pine River Logging case the immunities connected with laches and neglect of duty on the part of government agents came into play as well. Moreover, in this case the court took pains to point out that a suit involving public land "stands upon a different plane." Ibid., at 409.

[54] 294 U.S. 120 (1935).

[55] 311 U.S. 60 (1940).

[56] 310 U.S. 16 (1940).

[57] Ibid., at 32.

cases is the sum of the precedent that sustains the *Merrill* ruling. In terms of precedent, then, the *Merrill* case is a bold step in the way of strengthening the theory of immunities; it well illustrates the shortcomings of an argument by analogy without an effort to explain and then distinguish, if possible.

"Attenuated" would be a charitable adjective to apply to the relation between the fact situations in the cases discussed and that in the instant case. Here an administrative agency has been protected from the consequences of a misleading course of conduct while engaged in the act of providing a hired (and partially subsidized) service to a citizen acting in good faith. Further, the misapprehension was created through neglect on the part of agents in the field, the use of application forms which failed to supply the regional officials with useful information, and an accepted contract, delivery of which in toto was contingent upon a secretary stuffing an essential enclosure in an envelope. It is scarcely unreasonable to assume that a government agency with eight years of administrative experience and a substantial annual appropriation could safeguard itself against such bungling in routine tasks without pleading for an immunity. Nor does it seem fair that every man should shoulder the burden of this decision and approach his government with a sense of deep and abiding suspicion, and thus engage in a broad burlesque of caveat emptor in its heyday.

Despite the easily distinguished precedents relating to estoppel, the Supreme Court seemed to protest that it is powerless to act without congressional direction. However, it may be said that the judiciary, rather than Congress, has cherished the immunities. Justice Frankfurter has gone so far as to concede that Congress made its emergency agencies subject to suit because "the present climate of opinion . . . has brought governmental immunity from suit into disfavor. . . ."[18] Most important of all, it is hard to see how Congress can possibly enact any but the vaguest sort of standard as to what would constitute a proper application of an immunity in the myriad situations in which they could be in issue. As an aid to the judicial process a statute would be useless; what is needed is a legal arsenal replete with distinctions, analogies, and precedents to replace the solemn repetition of a dogma which exists on a higher plane than the case law which created it.

The better position would be an outright abolition of the immunities. The government has settled millions in damage claims after every war it has fought. It permits suits against itself in tort and contract. This does not appear to have brought the nation to the brink of financial ruin. The presumption would seem to be that the Republic would continue solvent even if its citizens had of right a chance to be remunerated for losses produced through mistake, delay, or illegal actions on the part of government agencies. Those who decry government inefficiency might well give their traditional whipping boys a rest and consider the worth of this sanction. Federal agencies would be on their mettle if they had to explain to Congress that charges on the Treasury were required to satisfy

[18] Keifer and Keifer v. Reconstruction Finance Corporation, 306 U.S. 381, 391 (1938).

claims arising from administrative failings. At least it may be argued that courts could well indulge in an assumption opposite to that which they now make in applying judicially created immunities: In the absence of a congressional declaration that specified immunities are to be accorded an agency, the acts of such units will be subject to the rules of law commonly applied in litigation involving private parties.

JUDICIAL DETERMINATION OF MORAL CONDUCT IN CITIZENSHIP HEARINGS

The dilution of personal liberties in other parts of the world has made United States citizenship an increasingly desirable element of personal status. As a result, our naturalization requirements have become of vital importance to many aliens who have been admitted to this country and who are seeking citizenship. Quite possibly the most perplexing standard which must be met is that of "good moral character."[1]

Aware of the problems of a stranger from another community seeking recognition in a new environment, our courts and immigration authorities must apply this standard to arrive at a definition of "good morals" which will be just to the applicant and healthy for our society. A striking example of the complications which ensue from the attempted application of the standard is *Repouille v. United States*.[2]

In the *Repouille* case an appeal was taken from an order of a district court granting Repouille's petition for naturalization. The order was reversed and the petition was dismissed without prejudice. The reversal turned on the court's determination that the petitioner had not conducted himself as a person of good moral character during the five years before he filed his petition. The facts shown were that on October 12, 1939 the petitioner had deliberately put to death his son, a boy of thirteen, by means of chloroform. The child had "suffered from birth from a brain injury which destined him to be an idiot and a physical monstrosity malformed in all four limbs. The child was blind, mute, and deformed. He had to be fed; the movements of his bladder and bowels were involuntary, and his entire life was spent in a small crib."[3] Toward his other

[1] 34 Stat. 598 (1906), 8 U.S.C.A. § 707 (a)(3) (1942). Most decisions on good moral character are made at the administrative level by the Immigration and Naturalization Service under 8 C.F.R. (Supp., 1947) §§ 353.1–353.3. There has been considerable disagreement concerning the periods of time which a court may survey and consider in making its decision concerning character. Some have held, as the statute provides, that the court is restricted to the five years immediately preceding the date of the petition. Petition of Zele, 140 F. 2d 773 (C.C.A. 2d, 1944). Others have inquired into the whole life history of the applicant in order to ascertain his true character and inclinations. In re Taran, 52 F. Supp. 535 (Minn., 1943). It seems clear that the requirement of good moral character survives the filing date of the petition and persists until and including the date of final hearing. United States v. Palmeri, 52 F. Supp. 226 (N.Y., 1943).

[2] 165 F. 2d 152 (C.C.A. 2d, 1947). [3] Ibid., at 152.

four children Repouille had always been dutiful and responsible; the children were entirely dependent upon him for support. Repouille was indicted for manslaughter in the first degree; the jury found him guilty of manslaughter in the second degree and recommended "utmost clemency." Repouille was sentenced to five to ten years, execution to be stayed, and was placed on probation from which he was discharged in December 1945.

Judge Learned Hand said the phrase "good moral character" in the Nationality Act set as a test "whether 'the moral feelings, now prevalent generally in this country,' would 'be outraged' by the conduct in question: that is, whether it conformed to 'the generally accepted moral conventions current at the time.'" He recognized the difficulty of applying the test "in the absence of some national inquisition, like a Gallup poll," but concluded that "quite independently of what may be the current moral feeling as to legally administered euthanasia, we feel reasonably secure in holding that only a minority of virtuous persons would deem the practice morally justifiable, while it remains in private hands, even when the provocation is as overwhelming as it was in this instance."[4] Judge Frank felt that the court was not justified in substituting its impression of the "generally accepted moral conventions" for that of the district judge, since the circuit court was in no better position than the district court to determine current public opinion on the private practice of euthanasia. He expressed the opinion that the correct statutory test is the attitude of "ethical leaders" but went on to say that the precedents in his jurisdiction compelled a decision based on contemporary public opinion. This might be ascertained by remanding to the district judge for a new hearing at which the parties could adduce reliable information on current mores.[5]

Both judges agreed that the decision should not be based on judicial predilection and that under the existing law they were bound to abide by public opinion; but they were in disagreement over the correct statutory test. While Judge Hand believed reference should be made to "the generally accepted moral conventions current at the time," Judge Frank favored reference to "ethical leaders." By either technique the judge is ineligible to make the final decision.

Granting for the moment that such judicial restraint is desirable, one may nevertheless question the referent which Judge Hand adopts. It is a little surprising that he spoke interchangeably of moral feelings being "outraged" and "the generally accepted moral conventions current at the time." According to Mr. Gordon Connelly of the National Opinion Research Center[6] it is conceivable

[4] Ibid., at 153. Ironically, if Repouille had delayed filing his petition from September 22 to October 14, 1944 he would have had a clear record for the full five-year period and would have been admitted without question. But the consequences of this decision were not unduly harsh, for the court practically "invited" Repouille to file another petition, saying "that the pitiable event, now long passed, will not prevent Repouille from taking his place among us as a citizen." 165 F. 2d 152, 154 (C.C.A. 2d, 1947). Even if he were naturalized, it is not clear that the petitioner could enjoy his full political rights since, by the law of New York, persons convicted of a felony are disfranchised. N.Y. Election Law (McKinney, 1943) c. 17, § 152.

[5] 165 F. 2d 152, 154–55 (C.C.A. 2d, 1947).

[6] Presently at the University of Chicago.

that a large segment of society may not approve of a given act but still may not be so "outraged" as to demand that the actor forfeit his chance for citizenship. Put another way, while Judge Hand may have correctly established the current public attitude toward euthanasia, it does not necessarily follow that those who believe euthanasia morally objectionable would deny citizenship to one who commits it under the circumstances in the *Repouille* case.

As a matter of fact, recent cases show an attempt to correlate the public attitude toward the petitioner's conduct with his potentialities for making a good citizen.[7] Only a short time before the *Repouille* case Judge Learned Hand found that an alien's marriage to his niece was not contrary to the generally accepted moral conventions and, hence, did not involve "moral turpitude."[8] Although the marriage was probably incestuous by the laws of every state in the union, he considered as controlling that the Catholic Church, of which both parties were communicants, had approved the marriage; the couple had four children and apparently lived a model family life; and there had been no familial intimacy between the uncle and niece, since they had met only eighteen months before their marriage. Society would probably agree that this man deserved citizenship. But contrast an earlier deportation case in which the "wife" and child of an American citizen were sought to be deported as aliens likely to become public charges. The citizen was married to a niece in Russia; she was a pauper, and an idiot child had been born of the marriage. By the law of Russia the marriage was valid, but by the law of Pennsylvania the marriage was incestuous. The court concluded that since the marriage was invalid, the "wife" and child had not obtained derivative citizenship. In ordering deportation, Judge McPherson asserted that he was applying the public standard of morality: "Whatever may be the standard of conduct in another country, the moral sense of this community would undoubtedly be shocked at the spectacle of an uncle and niece living together as husband and wife; and I am, of course, bound to regard the standard that prevails here and to see that such an objectionable example is not presented to the public."[9] The factors which prompted this conclusion are apparent. While, generally speaking, society would unhesitatingly condemn marriage between an uncle and niece, probably few would say that the court was not correct in granting citizenship in the *Francioso* case and denying it in the *Rodgers* case.

[7] Perhaps a higher standard of morality is required for naturalization than is expected of the ordinary citizen. For instance, while a citizen must be convicted of a felony to be disfranchised, an alien need not be guilty of a felony to be considered as lacking good moral character. United States v. Bergman, 47 F. Supp. 765 (Cal., 1942), reversed on other grounds 144 F. 2d 34 (C.C.A. 9th, 1944); see In re Paoli, 49 F. Supp. 128 (Cal., 1943). However, no generalization can be made without an extensive comparison of cases, a task which is not within the scope of this note.

[8] United States v. Francioso, 164 F. 2d 163 (C.C.A. 2d, 1947), noted 96 U. of Pa. L. Rev. 584 (1948); cf. Petition of R——, 56 F. Supp. 969 (Mass., 1944); In re Paoli, 49 F. Supp. 128 (Cal., 1943).

[9] United States ex rel. Devine v. Rodgers, 109 Fed. 886, 888 (D.C. Pa., 1901).

On another occasion a petitioner's military service record and his presumed ignorance of his unlawful conduct convinced the court that he was of good citizenship stock. Rubia, the petitioner, was a native-born Filipino, a coast guardsman serving his sixth consecutive enlistment. He presented six honorable discharge certificates under a statutory provision making such certificates prima facie evidence to satisfy the requirements of residence and good moral character. The government objected that Rubia was not of good moral character because for six months he and a married woman had been living together as man and wife. Rubia was unaware of the woman's marital status. It was insisted that since by Florida statutes, adultery is ground for divorce and living in an open state of adultery is punishable both by imprisonment and fine, Rubia's action completely overthrew the prima facie effect of the service and honorable discharge certificates. The court thought otherwise: "In view of applicant's long record of efficient and honorable service to the United States and the presumption of good moral character which attends that record, and in view of the testimony of the case which contains no word of adultery but only of a living together as 'man and wife,' the District Judge may well have found that applicant, in ignorance of the barrier which prevented their being lawfully joined as man and wife, had lived with the woman as 'man and wife,' believing himself to be living in a lawful, though informal, relation."[10] Thus, even though society condemns adultery, it is still possible for an adulterer to obtain citizenship. One might conclude from these cases that the primary consideration is not whether the petitioner has deviated from the generally accepted mores of the community but whether he has deviated sufficiently to forfeit his right to citizenship.

Although the question of "good morals" can be sufficiently narrowed to get the public reaction on the petitioner's eligibility for citizenship, there remains the task of getting an accurate sample of the current reaction. Judge Hand's suggestion of a general poll of public opinion is not without merit. One such poll conducted by the American Institute of Public Opinion in June 1947 showed a considerable percentage, though not a majority, of the populace in favor of legal euthanasia. The question asked: "When a person has a disease that cannot be cured, do you think doctors should be allowed by law to end the patient's life by some painless means if the patient and his family request it?" The results were: Yes, 37%; No, 54%; No Opinion, 9%.[11] Because a majority were opposed to

[10] United States v. Rubia, 110 F. 2d 92, 93 (C.C.A. 5th, 1940). Accord: Petitions of Rudder, 159 F. 2d 695 (C.C.A. 2d, 1947). Contra: Calo v. United States, 79 N.E. 2d 619 (Ill., 1948); Jaselski v. United States, 79 N.E. 2d 621 (Ill., 1948).

[11] Release by the American Institute of Public Opinion for June 21, 1947. In 1937 and 1939 the Institute found 46% in favor, 54% opposed. Slightly more men, 39%, than women, 35%, favor the practice. There is a sharp difference in attitude by ages:

Age	Yes	No	No Opinion
21–29	46%	47%	7%
30–49	36%	54%	10%
50 and over	33%	58%	9%

legal euthanasia, it seems Judge Hand correctly decided that society, speaking generally, would also condemn the practice in the hands of a private individual. But because such a large percentage favored the practice, we might infer that society "as a whole" would not be so "outraged" by the act as to deny citizenship to one who performs it.

It is doubtful, however, whether a general poll on the question of public morals is really helpful. The opinions expressed in recent polls on legal euthanasia vary according to age, economic status, sex, and education.[10] The recent study by Kinsey, *Sexual Behavior in the Human Male*,[11] shows an astonishing diversity in the moral standards of the community, varying with differences in educational, religious, economic, political, and sociological influences. No generalization can be made about *the* standard of public morality. But perhaps the most serious shortcoming of the poll is the off-the-cuff nature of the answers received. The pollster can hardly give each person interviewed time to give a reasoned reply, yet, by the nature of the question, much painstaking thought is required for an intelligent answer.[14]

Since a deliberative answer is desired, it seems that the use of a jury would be preferable to a general poll. The jury is convenient to use and represents a cross-section of society. Of course, the fact that naturalization is largely a matter of administrative law may be reason enough for not using a jury. But when a statutory provision based solely on public morals is involved, one might expect to find that the traditional device for keeping the judge in step with the man on the street would be used. The jury need not encroach upon the discretionary powers vested in the judge by the Naturalization Act,[15] because its function would be advisory.

In Philadelphia, The Evening Bulletin, April 16, 1948, reported a poll on the same question: Yes, 36%; No, 50%; Qualified Answer, 6%; No Opinion, 8%. The feeling against euthanasia is much stronger among low-income people than among those of average or above average income. It is much stronger among people with little education than among college graduates. The Minneapolis Tribune, November 2, 1947, reported: Yes, 36%; No, 55%; Depends, 3%; No Opinion, 6%. The breakdown by educational levels of people favoring euthanasia in Minneapolis: College, 38%; High School, 41%; Grade School, 26%. For a recent article urging adoption of the proposed Euthanasia Bill in New York see James, Euthanasia: Is "Merciful Release" Wrong? Reader's Digest 105–7 (June 1948).

[11] Note 11 supra. [13] See especially 327–483 (1948).

[14] It is extremely difficult to correlate the many ramifications of the problem of public morality into something approaching a definitive answer. Consider how Morris R. Cohen starts with the "[religious] taboo in the prohibition of any form of euthanasia or suicide, no matter how hideous or tortured life becomes" and proceeds to show that, "despite the depth of this religious fear of touching the gates of life and death," we consistently touch the life and death of certain Orientals by excluding them from our country and confining them to inadequate lands where many of them starve and that we condemn controlling birth and death rates but do not condemn the "wholesale death-dealing and birth-prevention of war." Cohen, The Faith of a Liberal 356–57 (1946). Undoubtedly, there are other "ethical leaders" who would violently disagree with Cohen's position and argue just as persuasively that these are not inconsistencies.

[15] 54 Stat. 1140, 1156 (1940), 8 U.S.C.A. §§ 701, 734 (1942). "The primary purpose of the naturalization laws is to grant citizenship only to those who, it appears, will make good Americans, and the court is in the best position to determine whether this is so in any given case." In re Paoli, 49 F. Supp. 128, 131 (Cal., 1943).

The requirement of deliberation might seem to be even more satisfactorily met by using an advisory group of "ethical leaders" in accord with Judge Frank's suggestion. Several objections to the use of a large group are apparent. Although presumably a "poll" of the ethical leaders could be made, it should be noted that the answer will be in terms of what men ought to think rather than necessarily what men do think. Furthermore, if the question is an interesting one, the area of dispute among ethical leaders may well be so great as to make the polling technique inappropriate.[16] Finally, there remains the problem of identifying the ethical leaders. But these difficulties lose force if only a few such leaders are consulted. Perhaps the use of higher standards would be a desirable tendency; and the problem of variations in standards vanishes with the use of fewer experts. Finally, whoever the ethical leaders may be, clearly the judges are among them. Of our judges, probably none are better qualified than Judges Hand and Frank, and yet both of them agreed in the *Repouille* case that, however the decision was to be made, it was not to be made by them. In the last analysis, any dependence by the judge on a standard outside himself in determining the question of good moral character in naturalization cases is likely to be unwise when not altogether futile.

[16] Kinsey, Sexual Behavior in the Human Male 327–483 (1948); Cohen, op. cit. supra note 14.

RECENT CASES

VALIDITY OF COMMODITY EXCHANGE REGULATIONS UNDER THE SHERMAN ACT

Prior to May 8, 1946, grain prices were subject to price ceilings established by the Office of Price Administration and the Secretary of Agriculture.[1] On that date the OPA, the Office of Economic Stabilization, and the Secretary of Agriculture jointly directed an increase in the maximum prices[2] per bushel of certain grains, effective on May 13, and coincident with the order the three governmental agencies recommended to the governing boards of grain exchanges throughout the nation that all futures contracts[3] be settled at the previously applicable ceiling prices. Four days later the Board of Directors of the Chicago

[1] Emergency Price Control Act of 1942, 56 Stat. 23 (1942), 50 U.S.C.A. App. § 901 (1947).

[2] The ceiling price of corn was raised 25 cents, wheat 15 cents, rye 10 cents, barley 9 cents, and oats 5 cents.

[3] Futures contracts are agreements to buy and receive or to sell and deliver grain during the delivery month at a presently stipulated price, subject to the rules of the contract market. Futures are to be distinguished from "cash" grain transactions, which consist in the buying and selling of grain by sample at the pits of the exchange for immediate delivery. The unit of futures trading is 5,000 bushels; terms of all contracts are identical; all trades must be made at the pits of the exchange; delivery is made during the delivery month after notice of intent to deliver has been served. Actually, less than 1 per cent of the futures contracts culminate in delivery, since they are "offset" by transactions which the sellers or buyers subsequently enter into on the exchange. All contracts must be "cleared" each day through the Clearing Corporation, which by Rule 314 of the Board becomes substituted as a seller to the buyer and as a buyer to the seller upon all futures contracts. A clearing member who has open "long" commitments—one who has purchased more grain than he has sold as represented by futures—is thus a buyer from the Clearing Corporation, and conversely one who is "short" is a seller. At the close of each day a clearing member is either net "long," net "short," or "even" with the Clearing House, and he must settle his transactions on the basis of the daily price fluctuations. If he has a net "long" position and the market advances, he gains, and he is entitled to payment from the Clearing House; if he has a net "short" position and the market advances, he sustains a loss and he becomes a debtor to the corporation. As defined by the Commodity Exchange Act hedging consists in the "sale of any commodity for future delivery . . . to the extent that such sales are offset in quantity by the ownership or purchase of the same cash commodity, or conversely purchases of any commodity for future delivery . . . to the extent that such purchases are offset by sales of the same cash commodity." For example, one who, like the plaintiff, has contracted to sell unacquired cash grain three months hence goes "long" or buys futures in an equal amount so that if the price of cash grain increases before he obtains it, his loss on the cash grain contract theoretically will be offset by his gain in the futures market, which fluctuates in relation to the "cash" grain market. The relationship between the "cash" and "futures" market is of course central to all hedging and speculating operations. For an informative account of the mechanics involved in futures trading and the nature of hedging see United States Dept. of Agriculture, Circular 151, Hedging in Grain Futures 1–32 (1931); cf. Rice v. Board of Trade, 331 U.S. 247 (1947); Board of Trade v. Olsen, 262 U.S. 1 (1923); Board of Trade v. Christie Grain & Stock Co., 198 U.S. 236 (1904); United States Dept. of Agriculture, Technical Bulletin 747, Grain Prices and the Futures Market (1941); Baer and Woodruff, Commodity Exchanges (1929).

Board of Trade promulgated Regulation 1894, which recited the request of the government as the basis for halting trading in outstanding futures contracts calling for delivery of grain in May, July, September, and December 1946, except for purposes of liquidation at the old ceiling prices. Between May 13 and May 31, 1946 the directors requested the three federal agencies to issue a directive which would replace the May 8 recommendation with a retroactive order that the grain exchanges carry out the governmental policy which had been expressed by the Board in Regulation 1894. But the agencies found that they had no power to issue such an edict,[4] and the request was refused. In Regulation 1898, adopted on May 31, 1946, the Board of Directors, announcing that they had reconsidered their previous decision of May 12, repealed that part of Regulation 1894 which had directed settlement of the May, July, September, and December futures at the old ceiling prices. The Board provided further that trading in old futures outstanding as of June 1, 1946 might be resumed at prices no higher than the ceilings which had become effective with the price boost of May 13. Subsequently, on June 13, the Board issued Regulation 1899, which asserted that governmental purchases for European famine relief would so deplete grain supplies for domestic trade as to prevent the performance of futures contracts, thereby enabling purchasers of futures to compel "liquidation at exorbitant and extortionate prices," and that as a result "an emergency existed which would render impossible the continuance on this exchange of a free, open, and orderly market where normal competitive elements can and may operate." The Board accordingly directed that trading in July, September, and December futures be stopped, and that such contracts be settled without delivery on the basis of the closing prices quoted on the exchange as of June 13. With the expiration of OPA on June 30 the imposition of ceiling prices on grain was terminated, and the price of "cash grain" soared.[5]

[4] The Emergency Price Control Act expressly denied to the administrator of that act the power to prohibit futures trading on contract markets. 56 Stat. 23 (1942), 50 U.S.C.A. App. § 902(e) (1947). The Commodity Exchange Act, 42 Stat. 998 (1936), 7 U.S.C.A. §1 et seq. (1939), vests no power in the Secretary of Agriculture to terminate futures or to fix the price of defaulted contracts.

[5] Futures prices prevailing on the Chicago Board of Trade before and after OPA prices were increased on May 13, 1946, and prices offered after the expiration of OPA ceilings on grain on June 30, 1946, are shown in the following table. Regulation 1894 ordered prices settled at

Contract	May 11 Price (Per Bu.)	June 13 Price (Per Bu.)	Highest Price for Corresponding Cash Grain during Period after OPA Ceilings Lifted	Differential between June 13 Price and Highest Price Subsequently Attained by Cash Grain before End of Period
July Corn	$1.21¼	$1.46¼	$2.29	$.82¾
September Corn	1.21¼	1.46¼	2.29	.82¾
December Oats	.83	.88	1.05	.17
September Wheat	1.83¼	1.98¼	2.18	.19¾
July Barley	1.26¼	1.35¼	1.79	.43¾
September Barley	1.26¼	1.35¼	1.79	.43¾
December Barley	1.26¼	1.35¼	1.89¼	.54
September Rye	1.44¼	1.58¼	2.41¼	.83

Had Regulation 1899 not been adopted, the value of futures contracts which were terminated would have substantially increased.[6] Treble-damage suits were subsequently filed by holders of futures who were "long" against the directors of the Chicago Board of Trade and the directors of its affiliate, the Board of Trade Clearing Corporation, charging that Regulations 1894 and 1899 constituted a conspiracy to fix prices and to restrain trade unreasonably in violation of the Sherman Anti-Trust Act.[7] The defendants averred that at the time of the regulations there was in effect an "emergency rule"[8] of the Board of Trade, incorporated by reference in all futures contracts, which granted the Board "power . . . to stop trading . . . in any future contracts . . . by reason of any emergency, and to make such regulations in regard to deliveries and settlement prices as it [the Board] might deem proper." The district court dismissed the complaints for failing to state a cause of action under the Sherman Act, and the judgments were affirmed by the Seventh Circuit Court of Appeals, which ruled that the two regulations terminated contracts pursuant to a lawful power of the Board and fixed a measure of damages for liquidated agreements. Certiorari was denied by the United States Supreme Court. *Cargill, Incorporated v. Board of Trade of the City of Chicago.*[9]

Commodity exchange markets are not governmental agencies,[10] and although regulated by the Commodity Exchange Act,[11] they have been granted no congressional exemptions from the anti-trust laws.[12] Furthermore, there is substantial, although indirect, evidence to indicate that the Congress which adopted the Sherman Act intended that it should apply to futures contracts.[13]

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prices listed in the May 11 column; Regulation 1898 reopened trading at the prices listed in the June 13 column; and the last two columns indicate the extent to which the plaintiff's contracts would have increased in value after expiration of OPA.

[6] The Federal Trade Commission has estimated that the total increase in value of the 23 million bushels of grain which were closed out by Regulation 1899 on June 13 would have totaled $7,569,292. See FTC, Report on Economic Effects of Grain Exchange Action Affecting Futures Trading During First Six Months of 1946, at 49 (1947).

[7] 26 Stat. 209 (1890), 15 U.S.C.A. §§ 1–7 (1941).

[8] Rule 251, Rules and Regulations of Board of Trade of the City of Chicago.

[9] 164 F. 2d 820 (C.C.A. 7th, 1947), cert. den. 68 S. Ct. 912 (1948). Companion cases arising from the same factual context and similarly decided were Bels v. Board of Trade of the City of Chicago, 164 F. 2d 824 (C.C.A. 7th, 1947), cert. den. 68 S. Ct. 913 (1948); Daniel v. Board of Trade of the City of Chicago, 164 F. 2d 815 (C.C.A. 7th, 1947).

[10] See Rice v. Board of Trade, 331 U.S. 247 (1947).

[11] 42 Stat. 998 (1936), 7 U.S.C.A. § 1 et seq. (1939).

[12] No industry is exempt from the provisions of the Anti-Trust Act unless Congress has expressly indicated that the Act is inapplicable. See Georgia v. Pennsylvania Railroad Co., 324 U.S. 439, 456 (1945); United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 553 (1944); United States v. Borden Co., 308 U.S. 188, 201 (1939).

[13] When the Sherman bill was under debate in the Senate, Sen. Ingalls of Kansas proposed an amendment which would have taxed out of existence the business of dealing in futures contracts. Grain futures were specifically enumerated in the amendment which was adopted by

But regulations and conduct by exchange markets, which, if viewed in another context might be deemed repugnant to the Sherman Act,[14] have been upheld by the Supreme Court. In *Board of Trade v. United States*[15] the Court declared valid the "call rule" which prohibited members of the Chicago Board of Trade from purchasing grain "to arrive" in the hours between the closing of the exchange one day and its opening the next day at any price other than the closing bid. By contrast, conduct based on the articles in the trade association agreements of sugar refiners[16] and hardwood manufacturers[17] not to deviate from announced prices has been condemned as contrary to the anti-trust statutes.

If anything is definite about contemporary monopoly law, it is the proposition that agreements to fix prices are illegal per se.[18] The "rule of reason"[19] has no application to combinations operating directly on prices, even though the members of the price-fixing group may be in no position to control the market.[20] In a very real sense the premature termination of the July, September, and December futures, coupled with the directive that they be liquidated at the existing ceilings, constituted price fixing. Pegging the price of futures would prevent the free interplay of the conflicting interests of sellers and buyers which causes the

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the Senate without a record vote. 21 Cong. Rec. 2613 (1890). The Sherman bill was subsequently redrafted by the Senate Judiciary Committee, which used substantially the same broad and sweeping language which Sections 1 and 2 of that Act contain today. Sen. Ingalls and proponents of the Ingalls amendment supported the redrafted bill. 21 Cong. Rec. 3145, 3153 (1890). Compare United States v. Patten, 226 U.S. 525 (1913) (conspiracy to run a corner in futures on the New York Cotton Exchange violates the Sherman Act).

[14] The regulations and by-laws of an exchange when considered as a whole do not contravene the anti-trust statutes. United States v. New York Coffee & Sugar Exchange, 263 U.S. 611 (1924). State courts have also viewed individual regulations of commodity exchanges sympathetically: State v. Duluth Board of Trade, 107 Minn. 506, 121 N.W. 395 (1909) (regulation providing for uniform rate of commission to be charged non-members does not violate Minnesota anti-trust statutes); Heim v. New York Stock Exchange, 63 N.Y. Misc. 504, 118 N.Y. Supp. 591 (1909), aff'd 138 App. Div. 96, 122 N.Y.Supp. 872 (1910) (resolution expelling members who transact business with a rival exchange does not violate New York anti-trust act). But cf. Pirnie Simmons & Co. v. Whitney, 144 N.Y. Misc. 812, 259 N.Y. Supp. 193 (1932) (regulation prohibiting members from dealing with non-members who did not comply with exchange rule regarding sale of stock by portfolios is an illegal restraint of trade).

[15] 246 U.S. 231 (1918).

[16] Sugar Institute, Inc. v. United States, 297 U.S. 553, 601 (1936).

[17] American Column and Lumber Co. v. United States, 257 U.S. 377 (1921).

[18] United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150 (1940); United States v. Trenton Potteries Co., 273 U.S. 392 (1927); Live Poultry Dealers' Protective Ass'n v. United States, 4 F. 2d 840 (C.C.A. 2d, 1924); see United States v. Paramount Pictures, Inc., 68 S. Ct. 915, 922 (1948); Ethyl Gasoline Corp. v. United States, 309 U.S. 436 (1940); Wholesale Dry Goods Institute, Inc. v. FTC, 139 F. 2d 230 (C.C.A. 2d, 1943); United States v. National Wholesale Druggists' Ass'n, 61 F. Supp. 590 (N.J., 1945). Some of the most troubling recent price-fixing questions have been raised in the patent cases. See 13 Univ. Chi. L. Rev. 504 (1946), noting United States v. Line Material Co., 64 F. Supp. 970 (Wis., 1946), and cases cited therein.

[19] Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911); United States v. American Tobacco Co., 221 U.S. 106 (1911).

[20] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224–25 (1940).

value of the contracts to vary from minute to minute and day to day. It was impossible on May 12 and June 13 to assess accurately the value of the futures contracts which would not mature until July, September, and December. And the fact that the stabilized price was the OPA ceiling would be immaterial if there were price fixing, since the vice is not the formula by which prices are set but the existence of an agreement to set prices.[21]

However, the Circuit Court, while recognizing the illegality of a price-fixing combination, held that the regulations could not be regarded as price tampering, but should be viewed as instructions to terminate, coupled with a proviso fixing the measure of damages.[22] In terms of this analysis the sellers would have been relieved of their obligations to deliver by the doctrines of impossibility and frustration.[23] Since this was a civil suit for damages pursuant to the Clayton Act,[24] and not a proceeding initiated by the government, the plaintiff had the burden of establishing damages proximately resulting from the defendants' allegedly unlawful acts.[25] The plaintiff argued that the impact of Regulations 1894 and 1899 was felt most sharply by grain merchants and processors like himself, who bought futures to hedge against forward commitments for grain or processed products.[26] The action of the Board nullified the expected price protection of their hedges, leaving them still obligated to buy cash grain at increased prices to meet their commitments but without the opportunity to "remove" their hedges as and when they acquired cash grain. But if the Board of Trade had simply halted trading and forbidden delivery without establishing the settlement price,[27] the plaintiff would have been deprived of the price insurance provided by his hedges. In this situation, if the sellers had defaulted when the contracts matured, the measure of damages would have been the value of the contracts as of the date of termination, which by law could not have been in excess of the ceiling price.[28] But the ceiling price coincided with the settlement

[21] Ibid., at 222.

[22] Cargill, Inc. v. Board of Trade, 164 F. 2d 820, 823 (C.C.A. 7th, 1947), cert. den. 68 S. Ct. 912 (1948).

[23] The defense of the sellers, if the stop order were a lawful regulation, would be similar to that presented where performance is rendered impossible by a change of law or an administrative regulation. See Williston, Contracts §§ 1938–39 (rev. ed., 1936); Rest., Contracts §§ 457–58 (1932). On the rights of parties where performance is prevented by war conditions, see 137 A.L.R. 1199 (1942).

[24] 38 Stat. 731 (1914), 15 U.S.C.A. § 15 (1941).

[25] See Keogh v. Chicago & Northwestern Ry. Co., 260 U.S. 156 (1922); Beegle v. Thomson, 138 F. 2d 875 (C.C.A. 7th, 1943).

[26] See FTC, Report on Economic Effects of Grain Exchange Actions Affecting Futures Trading During the First Six Months of 1946, at 50 (1947).

[27] This was the course of action taken by the Minneapolis Chamber of Commerce, which left the settlement terms to the arms-length negotiations of the buyers and sellers. See FTC, op. cit. supra note 26, at 63–70.

[28] The entire problem of damages is rendered unusually complex by the existence of price ceilings and speculation, set in a context of anticipatory breach and impossibility. The inability

figure actually stipulated by the Board, so that the plaintiff's financial position would be identical whether it was affected by the hypothetical regulation without the price-fixing element or by the regulation which the Board in fact issued. The thrust of this line of argument is that it was not the settlement provision in the regulation—the alleged price fixing—so much as the stop-trading element coupled with the expiration of OPA and the subsequent price spurt which caused damage to Cargill.

Since any damages which occurred were the direct result of the stop-trading order itself, the plaintiff was thus reduced to contending that the regulation was an unreasonable restraint of trade. Perhaps the most potent factor which militates against the success of an action based on this premise is that the "emergency rule" was drafted largely in compliance with a congressional mandate. The Commodity Exchange Act requires as a condition precedent to recognition as a contract market that the governing board of an exchange provide for "the prevention of manipulation of prices and the cornering of any commodity by the dealers or operators upon such board."[29] It is difficult to see how corners and manipulation can be prevented by the governing boards if they are powerless to close or restrict the sale of futures.[30] In addition, the general sympathy of the courts to open market trading rules and the general circumstances under which the Regulations were framed would attenuate the possibility of success of an action based on unreasonable restraint.

It is clear, of course, that uncurbed exercise of the emergency power by the governing boards could speedily demoralize the grain market and seriously damage the public interest.[31] The values of a futures market in terms of lower prices to consumers and the diffusion in the concentration of ownership in the grain industry, made possible because of the reduction of risk through hedging operations, are widely recognized.[32] If grain futures were subject to the whim and caprice of the management of contract markets, the utility of futures would be

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of the sellers (shorts) to mitigate damages after the stop-trading order would also be a relevant consideration. While the normal measure of damages for anticipatory breach is the value of the contract as of the date of performance, an exception has been recognized in the case of futures contracts where the market value of the futures as of the date of the breach may serve as the damage index. See Samuels v. E. F. Drew & Co., 286 Fed. 278 (D.C. N.Y., 1922); Williston, Contracts § 1397 (rev. ed., 1936); Sedgwick, Damages § 636-e (9th ed., 1909).

[29] 42 Stat. 998 (1936), 7 U.S.C.A. § 1 et seq. (1939).

[30] See Crowley v. Commodity Exchange, 141 F. 2d 182, 185 (C.C.A. 2d, 1944); Cargill, Inc. v. Board of Trade of the City of Chicago, CEA Docket No. 6 (Aug. 14, 1940). Plaintiff conceded that there might be some circumstances under which "emergency rule" 251 could properly be applied. Reply brief at 4.

[31] The FTC censured the Chicago Board of Trade for its "vacillating policy" in May and June 1946, which the FTC said resulted "in severe loss of public confidence." FTC, Report on Economic Effects of Grain Exchange Actions Affecting Futures Trading During the First Six Months of 1946, at 8 (1947).

[32] See Baer & Woodruff, Commodity Exchanges, 215 (1929); Report of the Federal Trade Commission on The Grain Trade: Effects of Future Trading, Vol. VII, at 270 (1926).

largely destroyed, and gambling and speculation would supersede legitimate trading.

The determination of whether or not an emergency exists is a matter reserved to the discretion of the Board, though a stop-trading regulation passed without the existence of a crisis would render the directors subject to the charge of ultra-vires conduct. In the present case the evidence to support the Board's conclusion is extremely persuasive.

At the time of enactment of the Regulations the government was engaged in wide-scale activity to combat famine in Europe. War Food Orders 144 and 145[33] compelled the sale to the Commodity Credit Corporation each week of all grain in the possession of grain merchandisers or grain elevator operators which had not been sold to priority purchasers. The government offered a bonus of 30 cents a bushel above the applicable ceiling price to induce farmers and warehousemen to sell corn and wheat to the Commodity Credit Corporation to be exported for famine relief.[34] The use of flour was drastically limited,[35] and gray bread appeared on bakery counters. Despite the force of these factors in reply to the restraint of trade argument, it is well established that if the court had regarded the Regulations as price fixing, neither the economic necessity of a ruinous market,[36] good faith,[37] nor alleged benefits to the industry and the public would have afforded a defense.

This case is a vagary in the law, arising from a curious combination of governmental price fixing, its removal, and the limited powers of governmental agencies. Here, as in the *Socony-Vacuum* case[38] which the plaintiff cited as its leading authority, the alleged unlawful conduct was carried out with the approval of federal officials. But the court in the *Socony-Vacuum* case rejected the defendants' contention that such acquiescence or support will provide immunity from an anti-trust charge.[39] Aside from the latter issue, *Cargill v. Board of Trade* is unique as the first case in which it has been urged that stop-trading regulations constitute a violation of the Sherman Act. The courts have previously rejected charges that such regulations are contrary to the constitutional protection against the impairment of the obligation of contracts,[40] or that they are an unlawful interference with contractual rights.[41] But the most far-reaching sig-

[33] 11 Fed. Register 1761 (1946).

[34] Ibid., at 4542.

[35] Ibid., at 5644.

[36] See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940); Handler, Federal Anti-Trust Laws—A Symposium, at 91 et seq. (1931). But cf. Appalachian Coals, Inc. v. United States, 228 U.S. 344 (1933).

[37] Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 44 (1930).

[38] 310 U.S. 150 (1940).

[39] Ibid., at 225–28.

[40] Thomson v. Thomson, 293 Ill. 584, 127 N.E. 882 (1920).

[41] Garcia Sugars Corp. v. New York Coffee and Sugar Exchange, Inc., 7 N.Y.S. 2d 532 (1938), aff'd without opinion sub. nom. Rifkind v. New York Coffee & Sugar Exchange, 258 App. Div. 871, 16 N.Y.S. 2d 1023 (1939); cf. Crowley v. Commodity Exchange, 141 F. 2d 182 (C.C.A. 2d, 1944).

nificance of this decision is that it tends to extend the life line of the unstated exception to the anti-trust laws which the Supreme Court appears to be evolving as it confronts the regulations of auctions or open markets such as a commodity exchange.[42] The permissible scope of these regulations is still subject to speculation. But the drift is perceptible, and the *Cargill* case clearly indicates its direction.

ENFORCEMENT OF PRIOR SUPPORT ORDER FOLLOWING EX PARTE FOREIGN DIVORCE

In 1943 the plaintiff, Mrs. Estin, brought an action for separation in New York in which her husband entered a general appearance. Upon a finding that the plaintiff had been abandoned, the court awarded her $180 a month as permanent alimony. Shortly thereafter the husband went to Nevada, and a year later instituted suit for divorce in which the wife was served only by publication and made no appearance. Upon entry of the Nevada decree of absolute divorce, the husband ceased making payments under the New York separation decree. In Mrs. Estin's subsequent suit for arrears, the New York Court of Appeals held that the ex parte Nevada divorce, although effective to dissolve the marriage, did not terminate the husband's duty to support his spouse.[1] On certiorari, the Supreme Court of the United States affirmed this judgment. *Estin v. Estin*.[2]

There was no question of the bona fides of the defendant's Nevada residence and hence no contention that the ex parte divorce did not dissolve the marital relationship.[3] But many courts have held, as did the New York Court of Appeals in the instant case, that the rendition of a valid foreign[4] decree of divorce, secured by one spouse upon constructive service, does not terminate the liability to pay alimony under a prior decree for separate maintenance.[5] The husband here argued, despite such decisions, that the Full Faith and Credit

[42] Board of Trade v. United States, 246 U.S. 231 (1918); United States v. New York Coffee & Sugar Exchange, Inc., 263 U.S. 611 (1924).

[1] Estin v. Estin, 296 N.Y. 308, 73 N.E. 2d 113 (1947), noted in 47 Col. L. Rev. 1069 (1947).

[2] 68 S. Ct. 1213 (1948). Justices Frankfurter and Jackson wrote dissenting opinions. See also the companion case of Kreiger v. Kreiger, 68 S. Ct. 1221 (1948), in which the same two justices dissented.

[3] Williams v. North Carolina, 317 U.S. 287 (1942), 325 U.S. 226 (1945).

[4] The term "foreign" as used herein applies to sister states.

[5] Estin v. Estin, 296 N.Y. 308, 73 N.E. 2d 113 (1947); Security Trust Co. v. Woodward 73 F. Supp. 667 (N.Y., 1947); Basset v. Basset, 141 F. 2d 954 (C.C.A. 9th, 1944), cert. den. 323 U.S. 718 (1944); Durlacher v. Durlacher, 123 F. 2d 70 (C.C.A. 9th, 1941), cert. den. 315 U.S. 805 (1942); Metzger v. Metzger, 32 Ohio App. 202, 167 N.E. 690 (1929); Miller v. Miller, 200 Iowa 1193, 206 N.W. 262 (1925); Simonton v. Simonton, 40 Idaho 751, 236 Pac. 863 (1925); Dorey v. Dorey, 248 Mass. 359, 142 N.E. 774 (1924); 3 Nelson, Divorce and Annulment § 32.48 (2d ed., 1945); see Barber v. Barber, 21 How. (U.S.) 582 (1858); Bennet v. Tomlinson, 206 Iowa 1075, 221 N.W. 837 (1928).

Clause[6] not only required the New York court to recognize the Nevada divorce as valid but also compelled it to extinguish the obligation to support his ex-wife.

However, it is well recognized that the Full Faith and Credit Clause places no requirement upon one state to recognize the efficacy of an in personam decree of a court of a sister state rendered without jurisdiction over the party defendant.[7] And while the Nevada court could terminate the marital relation because of its jurisdiction over the husband and the marriage,[8] it had no power to adjudicate the question of the wife's right to support because of its lack of jurisdiction over her. Thus, the ex parte Nevada divorce imposes no constitutional requirement on the state of New York to abandon its prior separate maintenance order.[9]

Furthermore, the full impact of the majority opinion not only denies the applicability of the Full Faith and Credit Clause but also suggests that any other action on the part of the New York court would be a violation of the due process clause of the Fourteenth Amendment. Ever since 1877 it has been clear that no personal judgment could be rendered against a defendant who was not personally served or did not voluntarily appear.[10] The Supreme Court of the United States, in the leading case of *Pennoyer v. Neff*, stated, "Proceedings in a court of justice to determine the personal rights and obligations of parties over whom the court has no jurisdiction do not constitute due process of law."[11] And since the Court considers alimony a debt,[12] Justice Douglas' statement in the *Estin* case cannot be seriously questioned: "[W]e are aware of no power which

[6] U.S. Const. Art. 4, § 1.

[7] Williams v. North Carolina, 325 U.S. 226 (1945); Pink v. A.A.A. Highway Express, 314 U.S. 201 (1941); Old Wayne Mutual Life Ass'n v. McDonough, 204 U.S. 8 (1907); Botz v. Helvering, 134 F. 2d 538 (C.C.A. 8th, 1943); Operative Plasterers' and Cement Furnishers' International Ass'n v. Case, 93 F. 2d 56 (App. D.C., 1937); Stewart v. Eaton, 287 Mich. 466, 283 N.W. 651 (1939).

[8] Williams v. North Carolina, 317 U.S. 287 (1942).

[9] In Glaston v. Glaston, 69 Cal. App. 2d 787, 160 P. 2d 45 (1945), the California court refused to give full faith and credit to a New York separate maintenance decree in which the wife was awarded a separation from bed and board and $100 per month alimony. Since the husband was served only by publication and did not appear in the New York action, the California court recognized the New York judgment as a separation from bed and board but refused to recognize its validity as an in personam money judgment because of the lack of personal service.

[10] Pennoyer v. Neff, 95 U.S. 714 (1877). The limitations placed on the broad doctrine of the Pennoyer case by Doherty & Co. v. Goodman, 294 U.S. 623 (1935), and Hess v. Pawloski, 274 U.S. 352 (1927), are inapplicable in the present case.

[11] 95 U.S. 714, 733 (1877). The Court, however, did not exclude the possibility of an ex parte divorce, for it declared, "To prevent any misapplication of the views expressed in this opinion, it is proper to observe that we do not mean to assert, by anything we have said, that a State may not authorize proceedings to determine the *status* of one of its citizens toward a non-resident, which would be binding within the State, though made without service of process or personal notice to the non-resident." Ibid., at 734.

[12] Sistare v. Sistare, 218 U.S. 1 (1910); Barber v. Barber, 21 How. (U.S.) 582 (1858); Is Alimony a Debt?, 27 Va. L. Rev. 914 (1941). But cf. Lynde v. Lynde, 181 U.S. 183 (1901), for an apparently inconsistent holding which was distinguished in Sistare v. Sistare, supra.

the State of the domicile of the debtor has to determine the personal rights of the creditor in the intangible unless the creditor has been personally served or appears in the proceeding."[13] The force of this argument had been anticipated by the Ninth Circuit Court of Appeals in *Bassett v. Bassett*,[14] where the court refused to terminate provisions for alimony under a separate maintenance decree despite a provision in the ex parte Nevada divorce decree "that the plaintiff be and is hereby released from any further obligation to support and maintain the defendant, and he is discharged and released from the duties and obligations to support the said defendant under [the] . . . judgment entered against him. . . ."[15]

While other courts have held that a valid ex parte divorce does terminate the right to receive alimony under a prior decree of separate maintenance,[16] the thrust of the *Estin* decision indicates that such holdings are incompatible with the Due Process Clause. This would be a logical application of the views expressed by Justice Douglas both here and in his concurring opinion in *Esenwein v. Commonwealth*.[17] For the violation of the Due Process Clause involved in terminating the right of support decreed to a spouse solely on the basis of a divorce obtained without her appearance before the court would be no less serious than the distortion of the Full Faith and Credit Clause which would result from a holding that the New York court must abandon its order for support because of an ex parte Nevada divorce. A court having jurisdiction over the parties would not infringe due process by discontinuing an order for support on grounds of the husband's inability to pay, a changed set of conditions whereby the wife no longer needs financial aid, or other mitigating circumstances. But to terminate such an order solely on the basis of an ex parte foreign divorce seems clearly unconstitutional.

The result of the majority opinion in the instant case is "to make the divorce

[13] Estin v. Estin, 68 S. Ct. 1213, 1218 (1948).

[14] 141 F. 2d 954 (C.C.A. 9th, 1944). [15] Ibid., at 955.

[16] Gullet v. Gullet, 149 F. 2d 17 (App. D.C., 1945); State v. Lynch, 42 Del. 95, 28 A. 2d 163 (1942); McCullough v. McCullough, 203 Mich. 288, 168 N.W. 929 (1918); Harrison v. Harrison, 20 Ala. 629 (1852); see Fox v. Wiley, 184 P. 2d 782 (Okla., 1947). "The dissolution of the marriage relation extinguishes the subject matter which forms the basis of an action or proceeding for separate maintenance." Herrick v. Herrick, 55 Nev. 59, 68, 25 P. 2d 378, 380 (1933).

[17] 325 U.S. 279, 282 (1945). ". . . [I]t is not apparent that the spouse who obtained the decree can defeat an action for maintenance or support in another State by showing that he was domiciled in the State which awarded him the divorce decree. It is one thing if the spouse from whom the decree of divorce is obtained appears or is personally served. . . . But I am not convinced that in the absence of an appearance or personal service the decree need be given full faith and credit when it comes to the maintenance or support of the other spouse or the children. See Pennoyer v. Neff, 95 U.S. 714." The Esenwein case arose in Pennsylvania, which apparently follows the rule that an absolute divorce, even though granted ex parte, terminates obligations under an outstanding separate maintenance decree; but since the entire Nevada proceeding was held void for want of domiciliary jurisdiction, the constitutionality of this rule was not adjudicated.

divisible—to give effect to the Nevada decree insofar as it affects the marital status and to make it ineffective on the issue of alimony."[18] But Justice Jackson, in his dissenting opinion, thought this division illogical. While he still believes that a divorce obtained by constructive service after a short residence should not be recognized,[19] he contends that if such a divorce must be considered valid, its effect is necessarily to terminate the plaintiff's right to alimony. This conclusion is based on the belief that New York law would allow the cessation of alimony payments under the separation decree had the ex parte divorce been granted in New York. Justice Frankfurter shared this view, although he favored remanding the case for clarification of New York law.[20]

The two dissenting opinions thus raise the question of the effect on a prior separate maintenance award of a subsequent divorce obtained in the *same state* which granted separate maintenance. Even where both parties have been present before the divorce court of their domicil, the courts have split on this issue,[21] although some decisions which seem to fall into this class of cases can be distinguished on grounds of estoppel,[22] consent of both parties to the alimony award,[23] or provisions made in the separate maintenance[24] or divorce[25] decree. When both parties appear in the divorce proceedings, it should make little difference what conclusion the court reaches. Each case must be decided on its own merits, and it would be just as appropriate for the court to declare that the husband need not continue to pay alimony as it would be for the court to conclude that the provisions of the separate maintenance decree should continue or even be increased. For it is the domiciliary state which is fundamentally concerned with the status of its residents, and it should be of small consequence whether it provides for those residents in a decree of divorce or a decree for separate maintenance.

However, in the only case in which a separate maintenance decree was followed by an ex parte divorce proceeding in the same state, the Arkansas Supreme Court held that the prior award was unaffected.[26] No cases have been

[18] Estin v. Estin, 68 S. Ct. 1213, 1218 (1948).

[19] See Justice Jackson's dissent in Williams v. North Carolina, 317 U.S. 287, 311 (1942), to which he referred in the Estin case, 68 S. Ct. 1213, 1221 (1948).

[20] Frankfurter, J., dissenting in Estin v. Estin, 68 S. Ct. 1213, 1219 (1948).

[21] The divorce does not terminate alimony under the separate maintenance decree: Robinson v. Robinson, 250 Ky. 488, 63 S.W. 2d 605 (1933); Bragg v. Bragg, 132 L.T.R. 346 (1924); Williams v. Williams, 96 Ky. 397, 29 S.W. 132 (1895). The divorce does terminate alimony: Holmes v. Holmes, 155 F. 2d 737 (App. D.C., 1946); Atkinson v. Atkinson, 233 Ala. 125, 170 So. 198 (1936); see generally 166 A.L.R. 1004 (1947).

[22] Bowers v. Bowers, 132 N.J. Eq. 431, 28 A. 2d 515 (1942); Schimek v. Schimek, 109 N.J. Eq. 395, 157 Atl. 649 (1931).

[23] Cox v. Cox, 197 Ga. 260, 29 S.E. 2d 83 (1944).

[24] Simmons v. Simmons, 223 N.C. 841, 28 S.E. 2d 489 (1944).

[25] Pickel v. Pickel, 291 Mo. 180, 236 S.W. 287 (1921).

[26] Wagster v. Wagster, 193 Ark. 902, 103 S.W. 2d 638 (1937). The wife had recovered alimony of $15 per month in a separate maintenance proceeding. When the husband later

found to sustain Justice Jackson's statement that by New York law, "if after a decree of separation and alimony, the husband had obtained a New York divorce against his wife, it would terminate her right to alimony."[27] Although New York courts have extinguished the duty to pay alimony under a separation decree where the wife instituted foreign divorce proceedings[28] or when the wife appeared in a foreign divorce suit,[29] no New York decision has ever declared a support order terminated because of an ex parte New York divorce. But even if such a precedent existed, the contention of the dissenting justice is adequately answered by the majority: "The difficulty with that argument is that the highest court in New York has held in this case that a support order can survive divorce and that this one has survived petitioner's divorce. . . . It is not for us to say whether that ruling squares with what the New York courts have said on earlier occasions. It is enough that New York today says that such is her policy."[30]

Not only is it constitutionally imperative for a court which has awarded a separate maintenance order to continue to enforce its decree in the absence of mitigating circumstances, but the result is also to be preferred in the light of the underlying policy which motivates an award of support. The doctrine that the rendition of a valid foreign divorce secured by one spouse upon constructive service will terminate liability to pay under a prior separate maintenance decree[31] is undoubtedly rooted in the history of alimony law. Absolute divorce was unknown to the early English common law and was available only by a private act of Parliament prior to the Divorce Act of 1857. Alimony could only be awarded by the courts in an action for separation.[32] Consequently, it is not surprising to hear modern courts expound the theory that an action for separate maintenance is dependent upon the existence of the marital relation and can only be maintained while that relation continues.[33] Of course, once this as-

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moved out of the state and his wife was granted a divorce on constructive service, the court decided that the prior decree had not been extinguished.

[27] Estin v. Estin, 68 S. Ct. 1213, 1221 (1948).

[28] Turkus v. Turkus, 180 N.Y. Misc. 857, 45 N.Y.S. 2d 803 (1943); Almquist v. Almquist, 43 N.Y.S. 2d 240 (1943) (husband appeared); Scheinwald v. Scheinwald, 231 App. Div. 757, 246 N.Y. Supp. 33 (1930) (husband appeared); Harris v. Harris, 197 App. Div. 646, 189 N.Y. Supp. 215 (1921); Gibson v. Gibson, 81 N.Y. Misc. 508, 143 N.Y. Supp. 37 (1913).

[29] Solotoff v. Solotoff, 51 N.Y.S. 2d 514 (1944); Richards v. Richards, 87 N.Y. Misc. 134, 149 N.Y. Supp. 1028 (1914).

[30] Estin v. Estin, 68 S. Ct. 1213, 1216 (1948).

[31] Cases cited note 16 supra.

[32] Vernier and Hurlbut, The Historical Background of Alimony Law and its Present Statutory Structure, 6 Law & Contemp. Prob. 197 (1939); 27 C.J.S. Divorce § 202 (1941).

[33] "Since the husband's duty to support the wife arises from the marital relation . . . the wife cannot maintain an action for separate maintenance after a decree of divorce. . . ." 42 C.J.S. Husband and Wife § 612 (1944), citing Stout v. Stout, 182 Okla. 490, 78 P. 2d 665 (1938); Atkinson v. Atkinson, 233 Ala. 125, 170 So. 198 (1936); Reppert v. Reppert, 214 Iowa 17, 241 N.W. 487 (1932); Hughes v. Hughes, 211 Ky. 799, 278 S.W. 121 (1925).

sumption is made, it is only a short step to a statement that the dissolution of the marriage concludes the right to receive alimony decreed in a prior separate maintenance action.

But it is clearly preferable to reason that a valid ex parte divorce need not preclude the continuation of payments decreed by a prior separation order. Such an award is to be considered not as punishment but rather as a means of providing for the needy spouse. Whether or not the wife is the guilty party should have no bearing on the issue, although the old Ecclesiastical courts would award permanent alimony only to an innocent wife who had secured the separation. "[T]his unenlightened view [is] totally blind to the fact that a guilty wife may starve as quickly as an innocent one . . . ,"[34] and, indeed, only five states now limit an award of alimony to the case of an innocent wife who is a petitioner.[35] Furthermore, the need for support would continue to exist even though the wife had appeared in the foreign divorce proceedings. Although the general rule seems to be that future alimony payments under a prior decree for separate maintenance are cut off when the wife appears in the husband's foreign divorce action,[36] the preferable view would continue the alimony payments awarded the needy spouse either where she procured the ex parte divorce[37] or where she contested a foreign divorce.[38] Of course, if the foreign court had jurisdiction over both parties and made a new alimony award, the decree for separate maintenance might well be superseded.[39] Nonetheless, it must not be forgotten that it is the wife's domiciliary state which is primarily concerned with her welfare.

The Supreme Court in the *Estin* case recognized the necessity for continuing support to the wife under the decree of separate maintenance despite the rendition of a valid foreign divorce. "In this case, New York evinced a concern with this broken marriage when both parties were domiciled in New York and before Nevada had any concern with it. New York was rightly concerned lest the abandoned spouse be left impoverished and perhaps become a public charge. The problem of her livelihood and support is plainly a matter in which her community had a legitimate interest."[40] Although the Court "put to one side the case where the wife was personally served or where she appears in the divorce

[34] Vernier and Hurlbut, op. cit. supra note 6, at 199.

[35] Ibid., at 210.

[36] Ex parte Jones, 249 Ala. 386, 31 So. 2d 314 (1947); Shaw v. Shaw, 332 Ill. App. 442, 75 N.E. 2d 411 (1947) (no printed opinion); Solotoff v. Solotoff, 51 N.Y.S. 2d 514 (1944); Mezger v. Mezger, 155 L.T.R. 491 (1936); Commonwealth v. Parker, 59 Pa. Super. 74 (1915); Richards v. Richards, 87 N.Y. Misc. 134, 149 N.Y. Supp. 1028 (1914).

[37] Wagster v. Wagster, 193 Ark. 902, 103 S.W. 2d 638 (1937).

[38] Manney v. Manney, 59 N.E. 2d 755 (Ohio, 1944).

[39] Isserman v. Isserman, 23 N.J. Misc. 174, 42 A. 2d 642 (1945); Gilbert v. Gilbert, 83 Ohio St. 265, 94 N.E. 421 (1911).

[40] Estin v. Estin, 68 S. Ct. 1213, 1217 (1948).

proceedings,"[41] the same considerations should apply when the divorce court makes no provisions for alimony.[42]

The *Estin* decision, in effect, may make the adoption of the more enlightened policy a constitutional requirement. It is not to be regretted that a state may perhaps no longer permit an unscrupulous spouse to shed an obligation which the state itself has imposed. For the Court's apparent holding on the due process issue prevents not only the lax divorce laws of foreign jurisdictions, but also the possible unconcern of the domicil for the welfare of its residents, from affecting a prior separate maintenance award.

CHOICE OF LAW BY CONTRACTUAL STIPULATION

The plaintiff's decedent, an aviation pilot employed by the defendant airlines, a Delaware corporation, was killed when his plane crashed at Birmingham, Alabama. His widow filed suit in a federal district court in Tennessee, claiming damages for negligence on the part of the defendant.[1] The latter defended on the ground that the terms of the decedent's contract of employment precluded an action for damages in the event of his death or injury.

The deceased's employment contract, a form which all flying personnel were required to sign, provided that all rights and obligations of the parties should be governed by the laws of Pennsylvania, including the Pennsylvania Workmen's Compensation Act. The Compensation Act limited the recovery for injury or death of an employee to certain fixed amounts and excluded negligence actions for damages on behalf of the employee against any employer subject to the Act. However, the Act was specifically applicable only to accidents occurring in Pennsylvania unless the injured person was a "Pennsylvania employee" temporarily outside the state.

The particular interstate flight in which the decedent was killed originated in New York; but by far the major portion of his flying service had been over the state of Pennsylvania. Each of his flights required a junction point stop at Pittsburgh, where the defendant maintained a large operating base. Two other Penn-

[41] Ibid., at 1216.

[42] The court in Bowers v. Bowers, 132 N.J. Eq. 431, 28 A. 2d 515 (1942), felt that failure of the wife to ask for alimony in a divorce proceeding which she initiated before a New Jersey court was a mere procedural defect, inasmuch as she had already been awarded alimony in a prior New Jersey separate maintenance proceeding. But the court in Holmes v. Holmes, 155 F. 2d 737 (App. D.C., 1946), terminated payments under a prior separate maintenance decree in a similar situation, stating, "In asking for a final decree, it does not seem to us too much to require that the right to receive alimony be asserted and judged in the light of the new or pending status of the finally divorced parties. This duty is rightly that of the moving party." Ibid., at 739.

[1] The defendant airline was allegedly negligent in ordering the aircraft to proceed from Knoxville to Birmingham under extremely hazardous weather conditions and in attempting to land the plane at Birmingham from too high an approach, at an excessive speed, with the plane out of control, under the direction of a pilot whose orders the plaintiff was required to obey.

sylvania bases were also maintained and operated by the airlines company, although its principal office was in Washington, D.C.

The district court dismissed the plaintiff's suit on the ground that damage actions against employees were barred by the Pennsylvania Compensation Act.[3] On appeal, the Court of Appeals for the Sixth Circuit reversed that judgment, holding that since the deceased was killed outside the state of Pennsylvania and was not a "Pennsylvania employee" according to judicial definition of that term, the Pennsylvania Workmen's Compensation Act was not applicable to the instant case. The court further concluded that, in accordance with the stipulated intent of the parties, the rights of the plaintiff and defendant should be determined by the general laws of Pennsylvania. In remanding the case to the lower court for trial on the merits, it was directed that decision be made on the basis of the laws of Alabama, because the Pennsylvania choice of law rule in dealing with tort problems was that the rights of the parties should be determined by the law of the state where the accident occurred. *Duskin v. Pennsylvania-Central Airlines Corporation.*[3]

The several conflict of laws issues raised by the instant case stem from the major problems of the effect and interpretation to be given to stipulations of contracting parties that the law or the particular laws of a certain state shall determine rights and obligations under their contract. In every case in which such a stipulation is considered by a court, the initial question is whether the circumstances are such that it will be given effect under the choice of law rules of the forum. In the event that the express intention of the parties is honored, the court faces a further question as to whether the contracting parties meant the whole body of law of the chosen state, including the conflict of laws rules of that jurisdiction, or whether they meant only that the domestic or internal law of the stipulated jurisdiction should control. In addition to these two basic considerations, the court in the *Duskin* case was required to interpret the meaning of the more specific stipulation that the Pennsylvania Workmen's Compensation Act was included in the law governing the parties' contract. The rationale or lack of rationale used by the court in deciding each of these issues invites comment on the decision against the background of the general problems stemming from contractual provisions that a given law shall be applicable.

Although leading theoretical writers in the field of conflict of laws have criticized the view that litigation arising under a contract shall be decided under the rules of the law whose application is intended by the parties,[4] the "intention"

[2] Duskin v. Pennsylvania-Central Airlines Corp., 71 F. Supp. 867 (Tenn., 1947). In the lower court, the compensation act was held to apply even though the accident occurred outside the state of Pennsylvania, the court ruling that the decedent was a "Pennsylvania employee" within the meaning of the act.

[3] 167 F. 2d 727 (C.C.A. 6th, 1948).

[4] Beale, Goodrich, and Lorenzen have been the main opponents of the "intention" theory in this country. 2 Beale, Conflict of Laws § 332.2, at 1079 (1935); Goodrich, Conflict of Laws 278 (2d ed., 1938); Lorenzen, Validity and Effects of Contracts in the Conflicts of Laws, 30 Yale L.J. 565, 658 (1921). Beale and Lorenzen object mainly on the ground that allowing

theory has been given frequent expression in American courts[5] and has been even more generally recognized in other countries.[6] However, in cases where express intent has been allowed to govern, the parties' choice has been limited by the requirements that it be made in good faith[7] and that it not violate any public policy of the forum.[8] Another limitation to be found in American cases has been that the state whose law is stipulated have some substantial contacts with the contract.[9] This latter exception to the "intention rule" was rejected by way of dictum in the much celebrated English decision of *Vita Food Products, Inc. v. Unus Shipping Company, Ltd.*[10] However, there apparently has been no square holding in Anglo-American law that such a stipulation will be given effect even in the absence of substantial contacts with the contract.[11]

In this context the language of the court in the instant case would be exciting were it not for the fact that the state of Pennsylvania actually had very substantial connection with the agreement of the parties. The court, in holding the stipulation of the parties valid, said: "There seems no more justification for

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parties to choose their law in this regard involves a delegation of sovereign powers to individuals. Goodrich, while agreeing with this view, does point out that there is no difficulty in allowing the parties to stipulate what rule shall be referred to in interpreting their language.

[5] 2 Beale, Conflict of Laws § 332.52, at 1173 (1935); see, for example, Connecticut General Life Insurance Co. v. Boseman, 84 F. 2d 701 (C.C.A. 5th, 1936), aff'd 301 U.S. 196 (1937); Liberty Nat'l Bank & Trust Co. v. New England Investors Shares, Inc., 25 F. 2d 493 (D.C. Mass., 1928); Mutual Life Insurance Co. v. Hill, 193 U.S. 551 (1904). Contra: E. Gerli and Co. v. Cunard S.S. Co., 48 F. 2d 115 (C.C.A. 2d, 1931). In the latter case the court said, "Some law must impose the obligation and the parties have nothing whatever to do with that; no more than with whether their acts are torts or crimes." Ibid., at 117.

[6] 2 Rabel, The Conflict of Laws: A Comparative Study 369 (1947). ". . . summary of the laws of the different countries shows that they are practically agreed upon the adoption of the intention of the parties as the fundamental rule governing the validity and effects of contracts . . . in the conflict of laws." (Referring to summary of the laws of England, the continental countries, Latin-American countries, and Japan). Lorenzen, Validity and Effects of Contracts in the Conflict of Laws, 30 Yale L.J. 565, 572 (1921); see also Cook, The Logical and Legal Bases of the Conflict of Laws 389 (1942).

[7] Andrews v. Pond, 13 Pet. (U.S.) 64 (1839). Following this case, the courts accepted the statement that parties' agreement upon a rule must be bona fide. 2 Beale, Conflict of Laws § 332.2, at 1081 (1935). This rule has been most often applied in usury cases.

[8] Mutual Life Insurance Co. v. Hill, 193 U.S. 551, 554 (1904); see 112 A.L.R. 124 (1938).

[9] Owens v. Hagenbeck-Wallace Shows Co., 58 R.I. 162, 192 Atl. 158 (1937); Brierly v. Commercial Credit Co., 43 F. 2d 724 (D.C. Pa., 1929); Bundy v. Commercial Credit Co., 200 N.C. 511, 157 S.E. 860 (1931); see also Seeman v. Philadelphia Warehouse Co., 274 U.S. 403 (1927); Merchants' and Manufacturers' Securities Co. v. Johnson, 69 F. 2d 940 (C.C.A. 8th, 1934); Crawford v. Seattle, Renton and S.R. Co., 86 Wash. 628, 150 Pac. 1155 (1915); 2 Beale, Conflict of Laws § 332.2, at 1081 (1935); but see Hurwitz v. Hurwitz, 216 App. Div. 362, 215 N.Y. Supp. 184 (1926); Boole v. Union Marine Ins. Co., Ltd., 52 Cal. App. 207, 198 Pac. 416 (1921).

[10] [1939] A.C. 277.

[11] As a practical matter, the parties are usually confined in their choice to the law of the place of making of the contract, the law of the place of performance, or in some instances the law of the state of domicil of one of the parties or the law of the place of the situs of the security. 2 Beale, Conflict of Laws § 332.2, at 1081 (1935).

precluding parties to a contract from stipulating that the laws of any jurisdiction, even if foreign to the elements of the contract, should govern the rights and obligations of the parties, where not against public policy, than for precluding them from stipulating in express terms what interpretation should be placed upon certain terms, clauses or provisions of the contract."[12] But since the defendant operated large bases in Pennsylvania, and since the deceased had flown mainly over that state, the above language can at best be considered strong dictum even though the court preferred to give effect to the stipulation of Pennsylvania law without formally determining the presence of actual contacts with the contract.

The merits of the question as to whether the limitation of substantial contact should apply to stipulations have been thoroughly discussed by leading writers on both sides of the issue,[13] so that further comment is unnecessary within the scope of this note. Nevertheless, it is interesting to consider that the approach adopted by the court in the principal case is not in accord with previous case law[14] and that it was obviously arrived at without knowledge of (or at least without reference to) Lord Wright's extensive discussion of the problem in the *Unus* case.[15] In the light of this development it may be that the *Duskin* case signifies a new point of departure for American decisions regarding the freedom with which parties may stipulate the law under which contractual rights and obligations will be determined.

More difficult than the decision as to the validity of the stipulation was the present court's problem of interpreting the same stipulation. The first phase of the court's task was a determination of the meaning of the stipulation of the "Pennsylvania Workmen's Compensation Act." The defendant argued that, even though the facts of the case might put the litigation outside the scope of the Act, its only liability was the *amount* provided by the Act for the death of an employee. But the court's holding that the parties did not intend to use the Act's provisions merely as a measuring stick of liability appears the most logical conclusion in the instant case.

The actual intent of the parties, especially that of the deceased as the mere signer of a form contract, is not ascertainable from their actions.[16] Consequently,

[12] Duskin v. Pennsylvania-Central Airlines Corp., 167 F. 2d 727, 730 (C.C.A. 6th, 1948).

[13] The "anti-intention" writers, of course, favor limitation on the breadth of the parties' choice; see 2 Beale, Conflict of Laws § 332.2, at 1081 (1935). However, even Professor W. W. Cook, who favored the "intention" theory, sanctioned the substantial contract limitation on the grounds of convenience to the court of the forum. Cook, The Logical and Legal Bases of the Conflict of Laws 412 (1942). On the other hand, one well-known writer in the field has recently urged that no reason exists for the substantial contact limitation on the choice of contracting parties, stating that the alleged exception seems as little justified as the objections against the intention of parties rule itself. Rheinstein, Book Review, 15 Univ. Chi. L. Rev. 478, 487 (1948), reviewing Falconbridge, Essays in the Conflict of Laws.

[14] Note 9 supra; see 112 A.L.R. 124 (1938).

[15] [1939] A.C. 277, 290. There is no reference to the Unus case in the instant decision.

[16] The court recognised this fact, stating, "What the actual intent of Duskin was, we have no way of knowing. He just signed a certain form contract.... Shortly afterward

the most honest analysis of the situation may be that the parties never thought of what the stipulation did mean. As in all such cases, the court must substitute its own idea of what the parties would have meant had they thought of the contingency.[17] The substantial connection of the state of Pennsylvania with the contract, coupled with the fact that the parties could just as easily have stipulated that the defendant pay the *amounts* established by the Compensation Act in case of death or injury, indicate the soundness of the court's decision to apply the Act in its totality or not at all. Of course, under a different factual situation, it would be just as possible that the most logical interpretation of the stipulation of a particular workmen's compensation act would be as a pure measure of liability of employer to employee.[18]

The present case sharply emphasizes the necessity for careful draftsmanship where parties wish to take advantage of the liability measurements established in a particular workmen's compensation act. Since the compensatory provisions of these acts are closely tied up with their administrative and procedural provisions,[19] the acts will be of no use to the parties unless the latter requirements are met. To avoid this possible inapplicability, the parties must provide by appropriate language that the act shall simply be a quantitative guide for determining employer liability in case of injury or death of an employee.

Of much greater significance than the problem discussed immediately above is that of interpreting the meaning of a stipulation that the laws of Pennsylvania (or of any state or country) shall govern the rights and obligations of the parties under the contract. The court in the instant case, in construing such a stipulation to include the conflict of laws rules as well as the domestic law of Pennsylvania within the meaning intended by the parties, achieved an unorthodox and rather startling result. This phase of the decision seems quite incongruous in an otherwise well-considered opinion, since it appears that the question of interpretation never occurred to the court here, but that it automatically

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he signed another form contract .... In all probability, he did not notice the difference between the contracts, and may not even have read them." Duskin v. Pennsylvania-Central Airlines Corp., 167 F. 2d 727, 731 (C.C.A. 6th, 1948).

[17] "Where ascertainably the parties have not given any thought to the problem, the law must step in with a rule of its own as it has to do in all those ... cases in which ... a contracting party has forgotten to take care of a situation for which he might have provided but which has escaped his foresight." Rheinstein, Book Review, 15 Univ. Chi. L. Rev. 478, 487 (1948), reviewing Falconbridge, Essays on the Conflict of Laws.

[18] Assume, for example, that a contract is entered into in France between a French pilot and his employer, a French airline, whereby the parties provide that all rights and obligations of the parties will be determined by the Illinois Workmen's Compensation Act. The only logical conclusion would be that the parties did not intend the application of the act in its totality.

[19] In general, an award may be made only by a board or commission to employees who come within the definition of that term in the act. Only injuries that arise out of, and in the course of, employment are compensable, and the acts usually stipulate the parties who may sue and to whom payment can be made. See 71 C. J. Workmen's Compensation (1935).

assumed that the "laws of Pennsylvania" meant the totality of that state's laws, and not just its internal or domestic rules.[20]

The uniqueness of the application of conflict of laws rules of a jurisdiction whose "law" has been stipulated in a contract is evidenced both by the dearth of case material on the subject[21] and by the uniform conviction of leading conflict of laws authorities that parties stipulating for an applicable law intend only the internal law to be applied in litigation arising under the contract.[22] In cases where the stipulated law has been given effect, other courts have automatically applied the internal rules of the selected law.[23] This practice is reflected by the comment of Dean Falconbridge in his recent treatise on the conflict of laws that "it is almost inconceivable that when the parties say that the contract is to be governed, for example, by English law, that they mean some law to be selected by the court in accordance . . . [with the conflict of laws rules of England]."[24] Walter Wheeler Cook, in discussing the same subject, concludes that "the intention theory, when limited so as to give effect to the 'expressed intention' of the parties merely enables them to provide that the measure of their respective rights and duties shall be the same as that established by the foreign state in question for *similar but purely domestic transactions*. What rights and duties the conflicts rule of the foreign state would attach to the transaction in question is entirely immaterial."[25]

Professor Cook bases his conclusion on the argument that the stipulation of a foreign law is "comparable to the insertion into agreements of stipulations which do not refer to 'laws' of other states, but merely alter what would otherwise be the legal consequences of the agreement."[26] Under this view, parties to a contract merely fix its terms and do not "legislate" in the sense that the law of a foreign state will actually control the contract, as the critics of the "intention theory" seem to suppose.[27] Several American cases give at least indirect support to Cook's analysis of the problem.[28] In *Mutual Life Insurance Co. v. Hill*[29] a life in-

[20] Duskin v. Pennsylvania-Central Airlines Corp., 167 F. 2d 727, 732 (C.C.A. 6th, 1948).

[21] Obviously the reason that the question has not been expressly decided in most cases is that it never occurs to either courts or parties that the conflicts rules of the stipulated law were intended to be applied. As a matter of fact, Dean Falconbridge asserts that the matter would not even be worth discussion were it not for the Unus decision, discussed in text at note 32 infra. Falconbridge, Essays on the Conflict of Laws 213 (1947).

[22] 2 Rabel, The Conflict of Laws: A Comparative Study 387 (1947); Falconbridge, Essays on the Conflict of Laws 213, 341–44 (1947); Cook, The Logical and Legal Bases of the Conflict of Laws 399 (1942); Cheshire, Private International Law 65 (2d ed., 1938). The brevity of the discussions afforded the problem by these writers and the fact that many leading authorities do not even consider the issue give some indication of the unanimity of feeling on the question.

[23] See, for example, cases cited note 5 supra; Cook, The Logical and Legal Bases of the Conflict of Laws 399 (1942).

[24] Falconbridge, Essays on the Conflict of Laws 213 (1947).

[25] Cook, The Logical and Legal Bases of the Conflict of Laws 400 (1942).

[26] Ibid., at 399. [27] Note 4 supra.

[28] Mutual Life Insurance Co. v. Hill, 193 U.S. 551 (1904); Louis-Dreyfus v. Paterson Steamships, Ltd., 43 F. 2d 824 (C.C.A. 2d, 1930); Mutual Reserve Fund Life Ass'n v. Minehardt, 72 Ark. 630, 83 S.W. 323 (1904).

[29] 193 U.S. 551 (1904).

surance policy executed in the state of Washington provided that the "contract shall be held and construed at all times and places to have been made in New York." Certain specific provisions in the contract which conflicted with a New York statute were given effect by the court, which said, "In determining the effect of such a stipulation it must be borne in mind that the applicability of other laws than those of the place of contract is a matter of agreement, and that the agreement may select laws and also limit the extent of their application. The case is precisely like one in which the parties, without mentioning laws or state, stipulate that the contract shall be determined in accordance with certain specified rules."[30]

Perhaps the only well-known decision in which a court has interpreted a stipulation of foreign laws to include the conflict of laws rules is, oddly enough, the *Unus* case again. There the law selected was that of England, but the court, instead of referring directly to English internal law, applied the English choice of law rule that contract problems are to be decided under the "proper law of the contract." This analysis has been severely criticized by Dean Falconbridge.[31] Fortunately, the "proper law" was held to be that intended by the parties, so that English domestic law eventually was applied. But resort to the Pennsylvania conflict of laws rule in the instant case had no such fortuitous results. It is hard to believe that the parties intended anything but the domestic laws of Pennsylvania to apply, and determination of their rights according to Alabama tort law would directly frustrate this intention. Generally, the purpose of parties in stipulating a foreign law is to settle in advance any doubts as to which internal law will be applied. There is little purpose in a liberal intention theory as advanced by the court in the *Duskin* case if the intention of the parties is to be subject to the vagaries of the choice of law rules of the stipulated law. The possibility of variance between the substantive internal law of the jurisdiction stipulated and that of the state to which a court is referred by the conflict of laws doctrine of that jurisdiction may substantially alter the result of the case. It is this possibility which makes the *Duskin* decision an unfortunate precedent.

Perhaps one additional observation should be made concerning the instant opinion. As in the *Unus* case, there is the possibility that the court is sanctioning the doctrine of renvoi[32] as universally applicable in the sense that a reference to the law of a foreign state always means a reference to its conflict rules. This seems hardly likely, however, in view of the almost universal rejection of the renvoi doctrine in America.[33] In addition, the *Duskin* case does not present a

[30] Ibid., at 554–55.

[31] Falconbridge, Essays on the Conflict of Laws 213, 341–44 (1947).

[32] The renvoi problem normally arises when the choice of law rules of the forum refer the court to the whole body of law of a second state and the conflict of laws rules of the latter jurisdiction refer the problem back to the law of the forum (or to the law of a third state). Consequently there might be a continuous reference back and forth without ever a decision possible through application of the internal law of either state.

[33] Rest., Conflicts of Laws § 7 (1934). The Restatement accepts the renvoi theory in two instances, however: where the title to land is in question [§ 8(1)] and where the validity of a decree of divorce is challenged [§ 8(2)]. "When the conflict of laws rule of the forum refers to

true renvoi situation,[14] since an express stipulation, in the final analysis, presents a problem of determining the intent of the parties rather than a question of application of a judicial policy. The court's failure to discuss either this problem or that of the meaning of a stipulation of the law to be applied indicates a regrettable insensitivity to critical conflict of laws issues.

CONFLICT OF LAWS PROBLEMS IN MULTI-STATE LIBEL

A Columbia University professor brought a libel action against the publishers of *Life* magazine in the District Court for the Eastern District of Pennsylvania, alleging that the defendant had printed an article associating him with certain people indicted "for fascist activities." *Life* magazine is circulated throughout the United States and in most other civilized countries. Several suits instituted by the plaintiff in other jurisdictions had been unsuccessful, apparently because of the local statutes of limitation. The district court in the present case held that the single cause of action which existed was barred by the Pennsylvania statute of limitations. Upon appeal to the Third Circuit Court of Appeals, the decision was affirmed in part and reversed in part.[1]

Pennsylvania law provides that when a cause of action is barred by the statute of limitations of the "state or country in which it arose, such bar shall be a complete defense to an action thereon . . . ." in Pennsylvania.[2] In deciding when and where the cause of action "arose," the circuit court determined that Pennsylvania regards the printing and distribution of all copies of each issue of a periodical having nation-wide circulation as but a single "publication"[3] and as giving rise to but one cause of action for libel.[4] The court concluded that this "single" cause of action "arose" in Illinois, where the publication of the alleged

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the law of a foreign state, the reference has generally been taken to be the internal law of that foreign state and not to its conflict of laws rules." Goodrich, Conflict of Laws 12 (2d ed., 1938).

[14] The true renvoi situation only arises when the law of another state or country is directly referred to by the choice of law rules of the forum. Where the parties stipulate a law, it is always possible, of course, that they actually mean the whole law, including the conflict of laws rules.

[1] Hartmann v. Time, Inc., 166 F. 2d 127 (C.C.A. 3d, 1948), cert. den. 68 S. Ct. 1495 (1948). The defense of res judicata was also raised. This question was remanded to determine whether or not plaintiff's unsuccessful suit in Massachusetts was actually decided on the merits.

[2] Pa. Stat. Ann. (Purdon, Supp., 1947) tit. 12, s. 39.

[3] "Publication" as used in libel cases is a term of art referring to the communication of defamatory matter to one other than the person defamed. See Rest., Torts § 577 (1938).

[4] The court relied on Bausewine v. Norristown, 351 Pa. 634, 641, 41 A. 2d 736, 740 (1945); Sarkees v. Warner-West Corp., 349 Pa. 365, 37 A. 2d 544 (1944); Summit Hotel Co. v. National Broadcasting Co., 336 Pa. 182, 196, 8 A. 2d 302, 309 (1939). The leading cases supporting this doctrine are Age-Herald Pub. Co. v. Huddleston, 207 Ala. 40, 92 So. 193 (1922); Wolfson v. Syracuse Newspapers, 254 App. Div. 211, 4 N.Y.S. 2d 640 (1938); Forman v. Mississippi Publishers Corp., 195 Miss. 90, 14 So. 2d 344 (1943); see also 148 A.L.R. 469 (1944); 37 A.L.R. 898 (1925).

libel to some third person presumably first took place.[5] It therefore held that the "Illinois" cause of action "engrossed" the injury done in all the states following the "single publication" rule[6] and was barred by the Illinois statute of limitations.[7] Any suit in Pennsylvania on the "Illinois" cause of action was therefore barred.

The court added, however, that many states still adhere to the traditional notion that "each time a libelous article is brought to the attention of a third person, a new publication has occurred; that each publication is a separate and actionable tort," and that Pennsylvania courts would "refer the respective foreign publications to the appropriate foreign laws."[8] On this basis the court held that later miscellaneous replacement copies of the same issue each constituted a new cause of action in those states which did not follow the "single publication" rule.[9] Causes of action which were not barred by the statutes of limitation in such states were held not barred by Pennsylvania law, so that each could be sued upon in Pennsylvania.

The confused result reached by the Court of Appeals was due to a curious application of the Pennsylvania choice of law rule,[10] which provides that "the law of the place or places, if any, where the cause or causes of action accrued governs in the creation of substantive rights."[11] Since the terms in a choice of law rule are necessarily defined by reference to the internal law of the forum,[12] the court employed Pennsylvania law to conclude that there could be but one cause of action. Under Pennsylvania law, the law which is applicable to an alleged multi-state libel is evidently the law of the "place of first impact," and inasmuch as the allegedly libelous material was first communicated to the public in Illinois, the law of that state was applied.[13] Had the court stopped here, the

[5] *Life* magazine is edited in New York City but is printed in Chicago and Philadelphia. Distribution to subscribers begins from Chicago and copies of each issue first appear on the news-stands in that city.

[6] Hartmann v. Time, Inc., 166 F. 2d 127, 134–35 (C.C.A. 3d, 1948), cert. den. 68 S. Ct. 1495 (1948).

[7] "Actions for slander or libel shall be commenced within one year next after the cause of action accrued." Ill. Rev. Stat. (1947) c. 83, § 14.

[8] Hartmann v. Time, Inc., 166 F. 2d 127, 134–35 (C.C.A. 3d, 1948), cert. den. 68 S. Ct. 1495 (1948).

[9] For a formal statement of what may be termed the "multiple publication" rule see Rest., Torts § 578, Comment b (1938).

[10] A federal court must look to the conflict of laws rule of the state in which the suit was brought. Klaxon v. Stentor, 313 U.S. 487 (1941); Erie v. Tompkins, 304 U.S. 64 (1938).

[11] Hartmann v. Time, Inc., 166 F. 2d 127, 133 (C.C.A. 3d, 1948), cert. den. 68 S. Ct. 1495 (1948).

[12] Falconbridge, Conflict of Laws 91 (1947). ". . . it would seem to be clear that the connecting factor specified in a conflict rule of the forum must be defined by the lex fori." But see Hancock, Torts in the Conflict of Laws 189–91 (1942).

[13] The court assumed that Illinois law applied to the "single" cause of action, without expressly stating that it was looking to the law of the place of first impact.

result would have been logically coherent. However, the court was impressed by the fact that states not adhering to the "single publication" rule would permit causes of action where their statutes of limitation had not run.[14] To say, as the court did, that the plaintiff could sue in Pennsylvania on causes of action "arising" in those states completely contradicted the major premise that Pennsylvania law characterizes a multi-state libel as giving rise to only one cause of action.

Although the court seemingly erred[15] in looking in part to foreign law in order to interpret the terms in the Pennsylvania choice of law rule, it nevertheless is one of the few courts to face squarely the intricate choice of law problem in libel cases having multi-state contacts.[16] Thus, the case presents an opportunity to examine the criteria which a court may utilize in formulating its choice of law rule.

Traditional notions of the proper basis upon which to determine the place of wrong in tort cases having multi-state contacts seem to have evolved from the typical personal injury situations.[17] In those cases the harm inflicted is usually sufficiently limited in space and time to simplify the choice of law problem.[18] But such unity of harm is not characteristic of a libel having multi-state contacts. In a sense an "impact" on the person libeled results each and every time the defamatory article is communicated to a third person. Where the circulation involves many states, the "place of harm" test leads, by logical implication, to the conclusion that at least one cause of action "arose" in each jurisdiction in which the libelous article has been circulated and read; moreover, the plaintiff may be able to sue the publisher in each jurisdiction as many times as the defamatory material was communicated to third persons there.[19]

[14] In such states, since each publication constitutes a new tort, the local statutes of limitation would seem to afford no practical protection to the defendant against stale claims. See 94 U. of Pa. L. Rev. 335 (1946), noting Hartmann v. Time, Inc., 64 F. Supp. 671 (Pa., 1946).

[15] Perhaps the court was really not sure that Pennsylvania followed the "single publication" rule. The Pennsylvania cases cited in note 4 supra did not involve choice of law problems, nor is it clear that they enunciated the idea that a widely circulated libel is but one cause of action. Moreover, the relatively new idea that there is one integrated publication instead of many publications constituting many torts has been principally used for purposes of applying local venue and limitations statutes. No case cited by the court used this concept in a choice of law situation to limit the number of different "foreign" causes of action the plaintiff might have. These considerations may have led the court to its odd result, for it really had no square precedent for applying the "single publication" notion to a choice of law problem.

[16] Hancock, Torts in the Conflict of Laws 252 (1942).

[17] See Alabama G.S.R.R. v. Carrol, 97 Ala. 126, 11 So. 803 (1892).

[18] Where the physical impact occurs in more than one state, it has been held that the law of each state will be applied to the damage resulting there. Connecticut Valley Lumber Co. v. Maine Central R.R., 78 N.H. 553, 103 Atl. 263 (1918).

[19] O'Reilly v. Curtis Publishing Co., 31 F. Supp. 364 (Mass., 1940), seems to be the only libel case which has squarely held that a separate cause of action exists in each jurisdiction in which there was a publication. That there could be more than one cause of action within each state was apparently not argued.

The objections to any such result are manifest. The plaintiff can harass the defendant with a multitude of suits in different states even though the conduct of the defendant amounts to only one integrated act. This possibility obviously strengthens the bargaining position of those who bring libel actions solely for extortionate purposes. The alternative possibility of incorporating all the various causes of action in a single suit would necessarily involve instructing a jury in the subtle distinctions existing in the substantive law of libel in each of forty-eight or more systems of law—a preposterous result. Should suits actually be brought in each jurisdiction, a defendant would be faced with the unfair prospect of having general damages repeatedly assessed against him regardless of the amount of actual injury to the plaintiff in each particular jurisdiction.[20] If we superimpose upon these difficulties the problem of adapting a nation-wide publication to the variance and uncertainty of libel law from jurisdiction to jurisdiction, the resulting burden on freedom of expression becomes a strong argument against adopting the traditional "place of impact" test.

One conceivable variation of the "place of impact" rule is the doctrine of "place of first impact."[21] In the case of a libel the place of "first impact" is presumably the jurisdiction in which the first unprivileged publication to a third person takes place. Under this theory the first impact serves to "complete" the cause of action, and all later publications in the same and other jurisdictions are considered only in assessing damages. The merit of such a test is its simplicity of application and its implicit recognition that the whole transaction results in only one cause of action which the forum can deal with by referring to only one system of law. But a rule necessitating stop-watch calculations to ascertain the proper law is so divorced from the realities of the publishing business as to be of dubious value. Indeed, if such a rule were generally adopted, publishers might conveniently have the "first impact" take place in the jurisdiction having the most lenient law of libel.[22]

Another possible significant point of contact for determining the applicable law is the domicil of the defamed person.[23] Although the domicil has an important interest in determining the scope of protection to be given the reputations of its residents, the major limitation of this theory is the possibility that the effects of the alleged libel may never be felt in the domicil. Furthermore, such a test compels the publisher to formulate a standard of conduct which varies with the domicil of the person alleging the defamation. And the basis for the

[20] Newell, Slander and Libel § 721 (1924). "General damages . . . arise by inference of law and need not be proved by evidence."

[21] Compare Banks v. King Features Syndicate, Inc., 30 F. Supp. 352 (N.Y., 1939). The court, in a right of privacy suit having contacts with more than one state, applied the law of state where "the seal of privacy was first broken."

[22] It would be a relatively inexpensive matter to start distribution in the most favorable state.

[23] Szalatnay-Stacho v. Fink, [1947] K.B. 1. The case did not involve a widely circulated publication. A letter was passed between two Czech officials in England libelling a third Czech official in Egypt. The English court applied Czech law.

doctrine breaks down completely in its application to purported defamations of persons whose reputation is widespread[24]—the very persons to whom nationally circulated periodicals give most attention.

Perhaps a more flexible solution, and one recognizing important contacts in states outside the domicil, would be to adopt the law of the place where the plaintiff has suffered the most harm.[25] But here too the publisher is denied the possibility of adequate prediction as to the scope of permissible conduct. In addition, this test may involve nearly insoluble questions of fact.

Least unsatisfactory as a basis for liability is the law of the jurisdiction in which the publisher has his principal place of business.[26] This test is easily applicable[27] and provides a fixed standard of conduct for the publisher. General adoption of such a rule would eliminate the evils of shopping for a forum; the publisher could not be harassed and coerced by multiple suits. The interests of legitimate plaintiffs would not be prejudiced, since they could recover damages for injury to reputation, wherever inflicted, in a single cause of action in any convenient forum.[28] Publishers might, of course, abuse the rule by concentrating their principal places of business in states having lenient libel laws, but the possibility is at best a remote one.[29]

The admixture of two mutually exclusive doctrines in the instant case illustrates the hopeless confusion present in multiple contact libel cases. Yet universal adoption of any of the suggested tests except the general "place of harm" theory would improve the situation immeasurably. Thus, should all the states adhere to the "principal place of publication" doctrine, apparently the only test meriting general approval, the result would approach the ideal of federal legisla-

[24] The Choice of Law in Multistate Defamation and Invasion of Privacy: An Unsolved Problem, 60 Harv. L. Rev. 941, 948 (1947).

[25] No court appears to have used such a test in a libel case having multi-state contacts. A somewhat analogous conflicts test is used in multiple-contact contracts cases. See Jones v. Metropolitan Life Ins. Co., 158 N.Y. Misc. 466, 286 N.Y. Supp. 4 (1936).

[26] United States v. Smith, 173 Fed. 227 (D.C. Ind., 1909) (semble). One writer has suggested applying the law of the place of broadcasting to widespread radio defamations. Hancock, Torts in the Conflict of Laws 253 (1942).

[27] The location of the main editorial offices is most likely the best test for ascertaining the principal place of business. In many cases editing and printing taking place in the same jurisdiction.

[28] Damages would also have to be ascertained under the standards set by the internal law of the jurisdiction in which the defendant does business. To say that after a libel has been established under that law, damages must nevertheless be measured by the various standards in other states, would be to undermine the administrative utility of considering the facts as giving rise to but one cause of action.

Publishers may argue that under such a rule they may be liable for injury inflicted upon the plaintiff in states which themselves would not consider the printed matter as libelous under their internal law. The defendant may avoid this apparent unfairness by conforming to the libel law of the state in which he does business.

[29] Liability for libels is probably a calculated risk in the publishing business and considered as a normal cost. It is doubtful that the economic impact of such a cost would induce a change in the business site to avoid it.

tion. But no potent force is operative to produce such a result, since state differences in the statement or application of choice of law rules no longer create constitutional questions.[30] The absence of a judicially developed uniform test and the unlikelihood of uniform state or federal legislation[31] point to continued inadequate treatment of these choice of law problems—a result particularly unfortunate because of the growth of mass communication.

DEBT COLLECTION BY BOYCOTT AS A "LABOR DISPUTE"

The respondent, a delicatessen proprietor, found that the delivery of bread from Hinkle's Bakery at the noon hour was inconvenient and "required" Hinkle's truck driver to deliver at another hour. After Hinkle's Bakery informed the respondent that it would no longer supply her, she was able to arrange a satisfactory hour of delivery with another bakery. Three weeks later the business agent of the union representing Hinkle's drivers appeared at the delicatessen and demanded immediate payment of $150 purportedly due the driver. He also demanded that the respondent stop selling a non-union made item which she had been carrying, and stated that the union would prevent all shipments of bakery, milk, and dairy products to her store from any source if these demands were not satisfied. According to the respondent, she then discontinued sale of the non-union made item and made payment of the amount requested, by check, to the bakery. The check, which had been turned over to the union business agent by the bakery, was returned with a letter saying that it could not be accepted in settlement because "it was $12.22 short of the amount which is owed to our member." The next day the respondent was informed by her new supplier that no more deliveries could be made, since the union had threatened to pull out all of its drivers if any more products were sold or delivered to the respondent. After a more extensive boycott had been established, with pickets parading in front of the delicatessen store, a federal district court granted the respondent's petition for an injunction pendente lite restraining both boycotting and picketing by the union. Upon appeal of the single question of whether the case involved a labor dispute under the terms of the Norris-LaGuardia Act, the Court of Appeals for the District of Columbia affirmed the lower court's decision that no labor dispute existed.[1] On certiorari, the Supreme Court affirmed, three justices dissenting. *Bakery Sales Drivers Local Union No. 33 v. Wagshal.*[2]

The Supreme Court, in a brief opinion, examined the three incidents com-

[30] O'Meara, Constitutional Aspects of the Conflict of Laws: Recent Developments, 27 Minn. L. Rev. 500 (1943).

[31] The Choice of Law in Multistate Defamation and Invasion of Privacy: An Unsolved Problem, 60 Harv. L. Rev. 941, 951 (1947).

[1] Bakery Sales Drivers Local Union No. 33 v. Wagshal, 161 F. 2d 380 (App. D.C., 1947).

[2] 333 U.S. 437 (1948).

prising the union's claim that a labor dispute existed. The controversy over the hour of delivery was characterized as "dead" and as "not involved in the subsequent dispute with the union, or in the boycott against which the injunction was issued." The disagreement over the bill was said to be a "business controversy" since, on the basis of uncontroverted allegations, the driver would receive his pay whether or not the respondent paid her bill, and, therefore, there was no dispute concerning "a condition of his employment." In accordance with the affidavit attached to the "answer to the motion to dismiss," which served as an allegation rather than proof, and which was not denied by the petitioner, the Court described the sale of the non-union made item as "not a bona fide bone of contention, but a mere pretext"[3] and concluded that the boycott was addressed only to the question of the payment of the bill. As a result, it was held that no labor dispute existed and, therefore, that the Norris-LaGuardia Act could not apply. Consequently, the Court held that the order for the injunction was not appealable. Justices Black, Douglas, and Murphy dissented without opinion. Presumably, a strong dissent could be built on the view that, despite the unique facts of the case, the majority opinion cuts unnecessarily and perhaps dangerously into the protective mantle of the Norris-LaGuardia Act. This view was expressed by Judge Edgerton, dissenting in the Court of Appeals decision.[4]

The majority opinion of the Court of Appeals contained an extensive discussion of the legitimacy of the union's objectives and the necessity of balancing the conflicting interests involved which, combined with the nature of the Supreme Court's affirmance, place upon the case the imprint of the "illegal purpose" doctrine. That the existence of a labor dispute under Section 13 of the Norris-LaGuardia Act[5] should depend upon a court's conception of a "bona fide labor controversy, founded upon issues involving the protection of labor in pursuing its legitimate objectives"[6] is surprising in view of the cases denying injunctive relief where the dispute in question was prompted by such motives as revenge,[7] compelling payment of a "sticker fee" in violation of the Sherman Act,[8] and securing employment of Negroes.[9]

Both the Supreme Court and the Court of Appeals appeared to base their holdings largely on the ground that the respondent had never directly paid the

[3] Ibid., at 440.

[4] Bakery Sales Drivers Local Union No. 33 v. Wagshal, 161 F. 2d 380, 384 (App. D.C., 1947).

[5] 47 Stat. 73 (1932), 29 U.S.C.A. § 113 (1947).

[6] Bakery Sales Drivers Local Union No. 33 v. Wagshal, 161 F. 2d 380, 383 (App. D.C., 1947).

[7] Hunt v. Crumboch, 325 U.S. 821 (1945) (damages and injunctive relief sought under the Sherman Act).

[8] Peterson v. Master Plumbers' Ass'n, 44 F. Supp. 908 (Nev., 1942).

[9] New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938).

wages of the driver and that what was involved was therefore a "business controversy." Although traditionally wages have been defined as compensation paid to an employee by his employer,[10] the reliance placed by both courts upon the absence of any employer-employee relationship between the plaintiff and the defendant seems misplaced, since Section 13 of the Norris-LaGuardia Act expressly eliminates the necessity for the existence of a proximate employment relationship between the parties to a labor dispute.

That section was liberally interpreted by the Supreme Court in the *New Negro Alliance* case,[11] where it was held that a labor dispute existed despite the facts that a non-labor organization sought an indirect benefit and that no question of wages, hours, or conditions of employment was involved. In the instant case it could be said that the union had a direct pecuniary interest, since Hinkle's customers were realistically the primary source of his driver's wages, and in this sense Hinkle might be thought of as a mere conduit for the flow of compensation from his customers to his drivers. Although the facts of the case indicated that the driver would receive his pay whether or not the respondent paid Hinkle, nonetheless Hinkle's collection of bills due him was a genuine matter of economic concern to the union.[12] It can likewise be said that the question of the hour of delivery concerned "terms or conditions of [the driver's] employment." In addition, even if the sale of the non-union made item was not a bona fide controversy, it was still a disputed point, so that it might be concluded, on that basis alone, that the case was one "involving or growing out of a labor dispute."

However, it is not difficult to appreciate the position of the majority in both the Supreme Court and the Court of Appeals decisions, for the whole amount due could easily have been collected in a small claims court if a bona fide debt existed. By choosing instead to exert the economic coercion of a boycott[13] to collect a debt of $12.22 the union was merely flexing its muscles. Such a resort to self-help was unnecessary, since an adequate remedy at law has always existed for the recovery of unpaid wages; indeed, the law grants the holder of such

[10] "[A] compensation given to a hired person for his or her services." Bouvier, Law Dictionary 3417 (1914). "[A]greed compensation for services rendered by the workmen, clerks, or servants . . . , those who have served [an employer] in a subordinate or menial capacity. . . ." In re Gurewitz, 121 Fed. 982, 983 (C.C.A. 2d, 1903).

[11] New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938).

[12] In Lichterman v. Laundry & Dry Cleaning Drivers Union Local No. 131, 204 Minn. 75, 282 N.W. 689 (1938), the court found that the union involved had a direct interest in prices charged customers by an employer, and injunctive relief was refused under Minnesota's little Norris-LaGuardia Act.

[13] The Court of Appeals pointed out that the "boycott . . . was successful in keeping appellee from purchasing bread either from bakers or retail stores in Washington or surrounding territory, even to the extent of a single loaf of bread." Bakery Sales Drivers Local Union No. 33 v. Wagshal, 161 F. 2d 380, 381 (App. D.C., 1947). In addition to the injunctive relief sought, the plaintiff asked for damages in the amount of $50,000, along with an equal amount of punitive damages.

a claim high preference rating over other types of creditors.[14] The resort to self-help here, moreover, violates a basic premise of any system of jurisprudence, since the existence of a bona fide debt is a fact properly determinable by a court, not by the relative strength of the two parties.[15]

The final decision is further strengthened if unions are considered on a par with businessmen,[16] since trade associations have been restrained from exerting combined pressure in the form of a concerted refusal to deal with an alleged debtor of one of their members. The court in *Heim Brewing Co. v. Belinder*[17] denounced such an extra-legal mode of debt collection, emphasizing the potentiality for extortion inherent in such a self-help measure. The same danger may be present in a policy which would permit the union in the instant case to enforce its claim with a boycott; the fact remains, however, that Congress has expressed its intent to apply a contrary rule where labor activity is involved.[18] Thus, even though the decision here protected the legitimate property interests of the respondent[19] while working little hardship to the union, it seems that the narrow scope of equity power left to the courts by the Norris-LaGuardia Act[20]

[14] This policy is exemplified by the Bankruptcy Act and various state statutes such as the one in Illinois reading "no personal property shall be exempt from levy of attachment or execution when the debt or judgment is for the wages of any laborer or servant. . . ." Ill. Rev. Stat. (1947) c. 52, § 16.

[15] In Bowe v. Judson C. Burns, Inc., 46 F. Supp. 745 (Pa., 1942), it was held that an action by employees, who were engaged in interstate commerce and who had worked overtime but had not been paid the overtime rate required by the Fair Labor Standards Act, was not a "labor dispute" within the meaning of the Norris-LaGuardia Act. The court distinguished a situation concerning unpaid wages from one involving a controversy as to rates of pay on the ground that in the former case the terms and conditions of employment were fixed and settled, so that there could be no dispute concerning them. See Dorchy v. Kansas, 272 U.S. 306 (1926).

[16] Gregory, Labor and the Law 191 (1946).

[17] 98 Mo. App. 590, 71 S.W. 691 (1903); United States v. King, 250 Fed. 908 (D.C. Mass., 1916) (semble); Swift & Co. v. United States, 196 U.S. 375 (1905) (semble). The rationale of the contrary line of decisions, exemplified by Brewster v. Miller's Sons Co., 101 Ky. 368, 41 S.W. 301 (1897), and McCarter v. Baltimore Chamber of Commerce, 126 Md. 131, 94 Atl. 541 (1915), is that such agreements do not constitute an offense at common law, since a person has the right to enter into a business undertaking with anyone he chooses, free from any legally imposed obligation to do otherwise. The Brewster case involved a situation of peculiar hardship, since the association involved included all the undertakers in the alleged debtor's community, all of whom refused to render the services necessary for the burial of his wife. Yet the court held that even if the claim asserted had no foundation in either "morals or law," if the members of the association chose to be influenced by it, the alleged debtor had no cause of action against them.

[18] Peterson v. Master Plumbers' Ass'n, 44 F. Supp. 908, 911 (Nev., 1942).

[19] The emphasis placed by the Court of Appeals upon the fact that the union activity tended to "ruin a legitimate business over a difference of twelve dollars and twenty cents" evokes speculation as to whether a contrary result would have been reached if the sum in question had been larger. The characterizing of the relationship of the parties as "casual" and the union's objective as "ridiculous" appears to be an attempt at justifying an erroneous decision by an appeal to rhetoric.

[20] Section 13, by defining the allowable area of economic conflict, substituted a broader conception of union economic interest for the narrow prevailing view of federal judges, both

was exceeded. If injunctive relief had been withheld, the respondent could still have sought damages in a subsequent action at law on the theory that the boycott had subjected her to unjustifiable tortious conduct.[21] Moreover, and perhaps most striking, the Supreme Court's opinion emphasized the letter rather than the spirit of the Act.[22] Although in the light of the facts presented the decision creates little cause for sympathy with the union, the danger of a return to a system of judicial settlement of labor disputes by injunction may be so real as to militate against even the slightest inroads on the Act.[23]

ILLINOIS TORT LIABILITY OF CHARITABLE CORPORATIONS

The infant plaintiff was severely injured in a fall from the unguarded roof of a wooden ticket office used as a part of the St. Philip Stadium, owned and operated by the Servite Fathers, an Illinois charitable corporation. The plaintiff sued on the theory that the wooden roof was an attractive nuisance, easily accessible to children and negligently maintained by the defendant in an unsafe condition. The defendant pleaded that because of its eleemosynary character it could not be held liable. Admitting the charitable character of the defendant corporation, the plaintiff nevertheless asserted liability because, prior to the accident, the Servite Fathers had procured a comprehensive general liability policy which effectively protected its trust fund. Attached to this policy was a rider which, in part, provided: "1. the company . . . will not use, either in the adjustment of claims or in the defense of suits against the insured, the immunity of the insured from tort liability, unless requested by the insured to interpose such defense."[1] The trial court reasoned that the defendant was absolutely immune from liability and that the indemnifying insurance did not create a liability where none had previously existed. On appeal, the Illinois Appellate Court reversed on the ground that the insurance policy created a separate fund, apart from the trust fund of the charitable corporation, which could be used to compensate any person injured as a result of the negligence of the defendant. *Wendt v. Servite Fathers.*[2]

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at common law and under Section 20 of the Clayton Act. See Gregory, Labor and the Law 184–99 (1946).

[21] Ibid., at 120–27.

[22] Report of the Senate Committee on the Judiciary, S. Rep. 163, 72d Cong. 1st Sess., at 25 (1932). "Section 13 of the bill defines various terms used in the act, and it is not believed that any criticism has been or will be made to these definitions. . . . In order that the limitation may not be whittled away by refined definitions of what persons are to be regarded as legitimately involved in labor disputes, the bill undertakes specifically to designate those persons who are entitled to invoke the protections. . . ."

[23] See Watt, The Divine Right of Government by Judiciary, 14 Univ. Chi. L. Rev. 409 (1947).

[1] Wendt v. Servite Fathers, 332 Ill. App. 618, 620, 76 N.E. 2d 342, 343 (1947).

[2] 332 Ill. App. 618, 76 N.E. 2d 342 (1947).

This holding represents a departure from prior Illinois decisions,[3] and appears to be in conflict with another recent decision by the appellate court.[4] Nevertheless, it follows the dominant trend in judicial thinking and can be reconciled with the local precedents, narrowly construed.

It is generally conceded that the American doctrine of immunity of charitable institutions from tort liability originated in an English dictum delivered in 1846.[5] This dictum, repudiated in the jurisdiction which produced it,[6] took root in this country,[7] though not without some resistance.[8] Some courts, however, desirous of checking the spread of another area of "protected negligence," have modified the strict rule. The decisions now run the gamut from full liability to full immunity, with a generous accompaniment of dissents, which Justice Rutledge has called, in his scholarly opinion in the *Georgetown College* case, the "earmarks of law in flux."[9]

The doctrine of strict immunity found its way into Illinois law more than forty years ago in the much-cited decision in *Parks v. Northwestern University*.[10] In that case, a student lost an eye through the alleged negligence of a professor. The court held that Northwestern University was a charitable corporation notwithstanding the fact that its students paid tuition, and that the rule exempting such a charity from liability for the negligence of its servants was necessary to prevent a diversion of its trust funds. If the trustees could not directly divert funds from the purposes for which they were donated, the negligent acts of the corporate servants could not be the basis of an indirect diversion.

Only two of the Illinois decisions involve the question of the effect of liability insurance. In *Myers v. Young Men's Christian Ass'n*,[11] immunity was sustained

[3] Hogan v. Chicago Lying-In Hospital, 335 Ill. 42, 166 N.E. 461 (1929); Parks v. Northwestern University, 218 Ill. 381, 75 N.E. 991 (1905); Myers v. Young Men's Christian Ass'n, 316 Ill. App. 177, 44 N.E. 2d 755 (1942), noted in 10 Univ. Chi. L. Rev. 211 (1943); Maretick v. South Chicago Community Hospital, 297 Ill. App. 488, 17 N.E. 2d 1012 (1938), noted in 6 Univ. Chi. L. Rev. 518 (1939); see Johnston v. City of Chicago, 258 Ill. 494, 498, 101 N.E. 960, 962 (1913).

[4] Piper v. Epstein, 326 Ill. App. 400, 62 N.E. 2d 139 (1945).

[5] "To give damages out of a trust fund would not be to apply it to those objects whom the author of the fund had in view, but would be to divert it to a completely different purpose." Feoffees of Heriot's Hospital v. Ross, 12 Clark & Fin. 507, 513 (1846); see also Duncan v. Findlater, 6 Clark & Fin. 894 (1839); Holliday v. St. Leonard's, 11 C.B.N.S. 192 (1861).

[6] Foreman v. Mayor of Canterbury, L.R. 6 Q.B. 214 (1871); Mersey Docks Trustees v. Gibbs, L.R. 1 H.L. 93 (1866).

[7] Perry v. House of Refuge, 63 Md. 20 (1884); McDonald v. Massachusetts General Hospital, 120 Mass. 432 (1876).

[8] Glavin v. Rhode Island Hospital, 12 R.I. 411 (1879).

[9] President & Directors of Georgetown College v. Hughes, 130 F. 2d 810, 812 (App. D.C., 1942). For other discerning opinions in this field, see Andrews v. Young Men's Christian Ass'n, 226 Iowa 374, 284 N.W. 186 (1939); Tucker v. Mobile Infirmary Ass'n, 191 Ala. 572, 68 So. 4 (1915).

[10] 218 Ill. 381, 75 N.E. 991 (1905).

[11] 316 Ill. App. 177, 44 N.E. 2d 755 (1942), noted in 10 Univ. Chi. L. Rev. 211 (1943). For a discussion of the contrary view see O'Connor v. Boulder Colorado Sanitarium Ass'n, 105 Colo. 259, 96 P. 2d 835 (1939), noted in 7 Univ. Chi. L. Rev. 567 (1940).

on the theory that it was improper to inform the jury that the defendant was protected by liability insurance. That question was not in issue in the instant case, nor was it controlling in the second Illinois case, *Piper v. Epstein*.[12] There the court, in upholding the insured defendant hospital's claim of immunity, stated: "The exemption from liability is absolute. The rule of *respondeat superior* is not applicable to charitable institutions. . . ." It was considered that the "reason for procuring the insurance is found in the provisions requiring the insurer to defend all claims and actions for damages, whether groundless or not, based on negligence of the officers and agents of the hospital."[13] The court relied on the *Parks* case which, in turn, relied on the "trust-fund" theory. As to the first of these statements, the liability is not necessarily absolute, and, as to the second, the only plausible reason in the *Servite Fathers* case for acquiring liability insurance was the charity's desire to protect those injured through its negligence. Moreover, there was no showing that the insured requested the immunity defense to be raised, which it might have done under the terms of the rider.[14] "The immunity doctrine was devised for the benefit of the charitable corporation, and if the corporation wishes to waive immunity, we know of no principle in law which would prevent it from doing so."[15]

Although the court in the instant case stated its personal disposition to discontinue the protection of charitable corporations from tort liability, it felt constrained to follow the decision of the supreme court in the *Parks* case, and consequently limited itself to a holding that "where insurance exists and provides a fund from which tort liability may be collected so as not to impair the trust fund, the defense of immunity is not available."[16]

Courts have generally categorized the rationales behind the granting of immunity under 1) the "trust-fund" doctrine,[17] 2) the specific inapplicability of

[12] 326 Ill. App. 400, 62 N.E. 2d 139 (1945).

[13] Ibid., at 410, 144.

[14] "It is also a matter of common knowledge that the Catholic Bishop of Chicago stipulates that insurance companies when defending local Catholic charities shall not plead the 'trust fund' theory as a defense." 21 Chi-Kent Rev. 256, 258 (1943), noting Myers v. Young Men's Christian Ass'n of Quincy, 316 Ill. App. 177, 44 N.E. 2d 755 (1942). See also Kos v. Catholic Bishop of Chicago, 317 Ill. App. 248, 45 N.E. 2d 1006 (1942).

[15] Wendt v. Servite Fathers, 332 Ill. App. 618, 634, 76 N.E. 2d 342, 349 (1947).

[16] Ibid. This view is in accord with two previous trial court decisions. Weil Cartage Co. v. Sisters of Holy Family of Nazareth, 38-C-3374, Circuit Court of Cook County, Illinois, cited in 20 Chi. Bar. Rec. 141 (1939); Shaleen v. The Newberry Library, 39-S-11479, Superior Court of Cook County, Illinois, cited in Survey of Illinois Law for the Year 1941–1942, 21 Chi-Kent Rev. 1, 8 (1942). Previously, immunity was not applied when the action arose out of contract, even though the effect would be a diversion of the trust funds. Armstrong v. Wesley Hospital, 170 Ill. App. 81 (1912). Even in contract actions, however, if the basis of the claim was the carelessness of the servants of the charity, immunity would be applied. See Wattman v. St. Luke's Hospital Ass'n, 314 Ill. App. 244, 41 N.E. 2d 314 (1942).

[17] For a full discussion of this rationale, see the concurring opinion by Wolfe, J., in Sessions v. Thomas D. Dee Memorial Hospital Ass'n, 94 Utah 460, 487, 78 P. 2d 645, 653 (1938). In the instant case the plaintiff waived all rights to levy execution upon the realty or other assets of the defendant.

respondeat superior to charitable institutions,[18] 3) the implied waiver by the beneficiary of a charity,[19] and 4) the catchall of "public policy."[20] Modification of the strict rule has varied according to court-made distinctions between the stranger and the beneficiary, the degrees of agency, and individual and corporate parties.[21] Of course any such modifications of the strict rule are inconsistent with the trust-fund diversion rationale, since the trust fund will necessarily be depleted, the donor's intention violated, and donors may be deterred from making contributions to charities. But simpler notions of "fault" have given way in many fields to notions of efficient distribution of loss.[22] Losses suffered by individuals from the operation of an enterprise should be distributed among all who benefit from the undertaking. Justice Rutledge agrees that "if there is a danger of dissipation, insurance is now available to guard against it and prudent management will provide the protection. It is highly doubtful that any substantial charity would be destroyed or donation deterred by the cost required to pay the premiums."[23]

The policy of loss-distribution finds expression in the limitations on the doctrine of ultra vires in the law of corporations,[24] the law of trusts,[25] and the law of agency.[26] Although charities are subject to full liability in at least four states,[27] and partial liability in more,[28] there is no evidence that charitable donations

[18] This is founded upon the notion that the doctrine of respondeat superior applies only where the master derives some profit from the actions of the servant; since charities are not engaged in commercial enterprise, the rule has no application. See Hearns v. Waterbury Hospital, 66 Conn. 98, 33 Atl. 595 (1895).

[19] The beneficiary of a charity is considered to have assumed the risk of injury as part of the consideration for the gratuitous services rendered him. The fact that this is a mere fiction, not based on actuality, is shown most strikingly in the case of the unconscious accident victim. See Stonaker v. Big Sisters Hospital, 116 Cal. App. 375, 2 P. 2d 520 (1931); Powers v. Massachusetts Homœopathic Hospital, 109 Fed. 294 (C.C.A. 1st, 1901).

[20] This frank theory has the advantage of throwing the choice which the courts or legislatures must make into sharp relief. Is placing the full burden of an injury on the injured individual preferable to requiring a charity to recompense him for its negligence, even though the latter course involves a "diversion" of the charity's trust funds? For a clear-cut delineation of the issues, see 2 Bogert, Trusts and Trustees § 401 (1935).

[21] For an enlightening analysis of these distinctions, see President & Directors of Georgetown College v. Hughes, 130 F. 2d 810 (App. D.C., 1942).

[22] See Loss-Shifting and Quasi-Negligence: A New Interpretation of the Palsgraf Case, 8 Univ. Chi. L. Rev. 729 (1941).

[23] President & Directors of Georgetown College v. Hughes, 130 F 2d 810, 823 (App. D.C., 1942).

[24] 10 Fletcher, Cyc. Corp. § 4902 (1931).

[25] 3 Bogert, Trusts and Trustees §§ 713, 725, 731–35 (1935); Rest., Trusts §§ 174, 264 (1935).

[26] See Steffen, Independent Contractor and the Good Life, 2 Univ. Chi. L. Rev. 501 (1935).

[27] Welch v. Frisbie Memorial Hospital, 90 N.H. 337, 9 A. 2d 761 (1939); Sisters of The Sorrowful Mother v. Zeidler, 183 Okla. 454, 82 P. 2d 996 (1938); Sheehan v. North Country Community Hospital, 273 N.Y. 163, 7 N.E. 2d 28 (1937), noted in 14 N.Y. U. L. Q. Rev. 534 (1937); Borwege v. City of Owatonna, 190 Minn. 394, 251 N.W. 915 (1933).

[28] See Tort Liability of Charitable Institutions, 29 Iowa L. Rev. 624, 628–29 (1944).

have decreased in those states or increased in those states favoring strict immunity.

In addition, charities now are more like business enterprises than in the past—they have a capacity for bearing loss undreamed of at the time when the doctrine of immunity was first formulated. Then, a single negligence action might have wiped out a small charity with meager funds. Now, however, charities are in a position to protect their funds. It is an odd rule that would place the whole of the loss upon a single injured individual if, fortuitously, the negligence of a charity causes that loss. The decision in the instant case, although unfortunately limited, points the way for the Illinois Supreme Court or for the legislature to join those states which have abandoned the unfair and outmoded doctrine of immunity.

FIDUCIARY DUTY OF INSURER IN SETTLEMENT OF CLAIMS

In *Kellogg v. Iowa State Traveling Men's Ass'n*[1] the Supreme Court of Iowa struck down a purported accord and satisfaction, seemingly relying on the rule in *Pinnel's Case*, but also asserting the unique notion that an insurance company is under a fiduciary duty to its policyholders.[2] The plaintiff, administrator of the estate of the deceased beneficiary, brought an action at law on a $5,000 membership certificate of the defendant association to recover for the accidental death of the insured. The certificate provided for an indemnity of $5,000 in the case of death resulting exclusively from bodily injuries accidentally received but disclaimed liability in excess of 1/10 of that amount if death or disability should be caused by, or be effected or aggravated by, "heart" disease.

The insured, who was sixty-eight years old, was severely shaken up and bruised in a highway collision on June 25, 1945. He complained of pains in his abdomen, and onlookers brought him to his home, where he died within an hour.

A doctor examined him about ten minutes after his death. In the proofs of loss the doctors stated that the insured died of coronary thrombosis, initiated by the accident and subsequent nervous shock. No X-rays were made and no autopsy was performed.

The proofs of loss were delivered to the defendant, and no other correspondence took place. The defendant mailed to the insured's wife a check for $500, which stated on its face that its indorsement by her as payee would be settlement in full for all claims for indemnity arising under the membership. There was evidence that she knew that the insured had suffered from previous attacks

[1] 29 N.W. 2d 559 (Iowa, 1947).

[2] The notion should be contrasted with the well established doctrine that in cases of suretyship and marine insurance there is a strict duty of full disclosure, amounting to a fiduciary duty owed by the insured to the insurer. Richards, Insurance §§ 79, 80 (4th ed., 1932); Arant, Suretyship § 28 (1931).

of angina. She indorsed the check and received payment thereon. The accompanying letter requested her to sign and remit an inclosed release, but she did neither. Shortly thereafter she died.

The plaintiff admitted the payment of $500 and prayed judgment for $4,500, alleging that the insured's death was exclusively the result of bodily injuries accidentally sustained and that the $500 was received not in compromise and settlement of the claim of $5,000 but as a credit thereon.

An expert medical witness testified at the trial that there was insufficient evidence to determine with certainty what the insured died of, but that in his opinion death was most likely caused by injuries to internal organs in the abdomen. At the close of the evidence the jury returned a verdict of $4,500 for the plaintiff, but the trial judge held that there was an accord and satisfaction and entered judgment for the defendant notwithstanding the verdict. On appeal, the Iowa Supreme Court ruled that there was no accord and satisfaction and ordered the trial court to reinstate the judgment for the plaintiff on the verdict, one judge specially concurring and three judges dissenting.

American courts have generally followed the rule in *Pinnel's Case*,[2] affirmed in *Foakes v. Beer*,[4] that payment of a lesser sum in full satisfaction of a larger sum then owing is not consideration to support a discharge of the residue. The rationale of the rule is usually said to be that there is no detriment to the debtor other than the obligation which he is already under and no benefit to the creditor other than that which was already due him.[5] This doctrine, however, has been adversely criticized and subjected to frontal attacks for many generations[6] as a "relic of antique law which [makes] the requirement of consideration an overworked shibboleth rather than a logical and just standard of actionability."[7]

Claims for money may consist of liquidated or unliquidated amounts, either indisputably due or in dispute. The possible combinations of these factors give rise to various correlative rules based on the requirement of consideration for the enforcement of contracts. The rule in *Pinnel's Case* applies only where the claim is liquidated and undisputed—where a sum certain is admittedly due.[8]

[2] 3 Co. 117 a (1602). [4] L.R. 9 App. Cas. 605 (1884).

[5] Foakes v. Beer, L.R. 9 App. Cas. 605 (1884); 1 Williston, Contracts § 120 (rev. ed., 1936); Ames, Two Theories of Consideration, 12 Harv. L. Rev. 515, 526 (1899); Gold, The Present Status of the Rule in Pinnel's Case, 30 Ky. L. J. 72, 73 (1941).

[6] See for example, Ames, op. cit. supra note 5; Gold, op. cit. supra note 5; Sharp, Promissory Liability II, 7 Univ. Chi. L. Rev. 250, 253 (1940); Street, Foundations of Legal Liability 89 (1936); Allen, Law in the Making 289 (1946).

[7] Rye v. Phillips, 203 Minn. 567, 569, 282 N.W. 459, 460 (1938). A list of more than twenty common-law jurisdictions in which the rule has been eliminated by statute or by judicial construction is available in Gold, op. cit. supra note 5, at 203. Even where the rule has been retained the applications of its exceptions have been more numerous than the applications of the rule itself. Frye v. Hubbell, 74 N.H. 358, 68 Atl. 325 (1907); Brooks v. White, 2 Metc. (Mass.) 283 (1841); 119 A.L.R. 1123, 1125 (1939).

[8] Foakes v. Beer, L.R. 9. App. Cas. 605 (1884); Chicago, M. & St. P. R. Co. v. Clark, 178 U.S. 353 (1900); 1 Am. Jur., Accord and Satisfaction § 39 (Supp., 1947).

Where a claim is unliquidated and disputed—where the amount due, if anything, is unascertained and is the subject of a dispute conducted in good faith and with some color of reason—it is well settled that the surrender of the claim for a lesser sum is good consideration to support an accord and satisfaction.[9] It is equally well settled that a liquidated and disputed claim, or an unliquidated and undisputed claim, may be compromised by payment of less than the amount claimed.[10] There is a conflict, however, as to whether payment of the conceded part of a single claim is consideration for the discharge of the disputed balance of the claim.[11] Those courts which hold that such payment is consideration base their decisions on the theory that a dispute as to a part makes the entire claim uncertain in amount so as to bring the case within the rule that part payment of an unliquidated and disputed debt in full satisfaction thereof discharges the entire debt.[12] Execution of a receipt in full is generally considered not to take the case out of the operation of the rule in *Pinnel's Case*,[13] although one court has suggested that under such circumstances a defendant debtor may plead estoppel.[14]

In the typical situation requiring the application of the rule a creditor releases a claim for a specific and conceded amount due in consideration of part payment of the amount. Insurance cases, however, are not like those arising in the ordinary debtor-creditor relationship. The instant case involved payment of an amount concededly and indisputably due in an attempt to satisfy an additional and distinct liability which arose under the contract. Only the question of liability for the claim, not the amount of the claim, was in dispute. The majority took the position that there were two claims, one for $500, which was liquidated and owing in any event, and one for $5,000 minus the amount paid on it, which was due in the event that the insured's accidental death was not in any way a result of heart disease. Their decision proceeded, however, on the

[9] San Juan v. St John's Gas Co., 195 U.S. 510 (1904); 1 Am. Jur., Accord and Satisfaction § 60 (Supp., 1947).

[10] Simms Oil Co. v. American Refining Co., 288 S.W. 163 (Tex. Comm'n App., 1926); see 1 Williston, Contracts §§ 128, 129 (rev. ed., 1936).

[11] Ferryboatmen's Union v. Northwestern Pacific R. Co., 84 F. 2d 773 (C.C.A. 9th, 1936); Schuttinger v. Woodruff, 259 N.Y. 212, 181 N.E. 361 (1932); 1 Williston, Contracts § 129 (rev. ed., 1936); 112 A.L.R. 1219, 1221–22 (1938).

[12] Tanner v. Merrill, 108 Mich. 58, 65 N.W. 664 (1895); Schultz v. Farmer's Elevator Co., 174 Iowa 667, 156 N.W. 716 (1916); Snow v. Griesheimer, 220 Ill. 106, 77 N.E. 110 (1906); 1 Williston, Contracts § 420 (rev. ed., 1936).

[13] Fire Ins. Ass'n Ltd. v. Wickham, 141 U.S. 564 (1891); Buel v. Kansas City Life Ins. Co., 32 N.M. 34, 250 Pac. 635 (1926); Pennsylvania R. Co. v. Cameron, 280 Pa. 458, 124 Atl. 638 (1924). A release under seal, however, takes the case out of the operation of the rule. See Foakes v. Beer, L.R. 9 App. Cas. 605 (1884). But in many jurisdictions the common-law effect of the seal has been abrogated by statute or decision, thus greatly limiting the effect of instruments under seal on the rule in Pinnel's Case. Gold, op. cit. supra note 5; see Woodbury v. United States Casualty Co., 284 Ill. 227, 120 N.E. 8 (1918).

[14] See Meyers v. Acme Homestead Ass'n, 18 La. App. 697, 138 So. 443 (1931); cf. Rest., Contracts § 90 (1932).

erroneous theory that the larger amount was an undisputed and liquidated sum, for the release of which, under the rule in *Pinnel's Case*, payment of the lesser sum could be no consideration. Whether the claim was liquidated or unliquidated was actually immaterial, since the applicability of the rule in *Pinnel's Case* depends also on the claim's being undisputed. The majority seemed to think that the dispute as to liability for the claim and the disputed amount of the claim were one and the same question and that since the amount was ascertained it was not disputed.[15] This confusion obscured additional grounds upon which the court placed its decision,[16] and upon which decisions in this type of case are usually placed: Payment of an undisputed claim does not constitute consideration for the release of an additional, disputed claim, whether liquidated or unliquidated.[17] The specially concurring judge, who was joined by three members of the majority, based his opinion on the applicability of this rule to accident insurance policies. The dissenting judges argued, however, that the entire claim was an indivisible and unliquidated sum—that either $500 or $5,000 was due—so that satisfaction of the lesser claim would necessarily extinguish the greater.

But even the construction placed on the nature of the claim by the dissenting judges should have resulted in the conclusion, entirely independent of the rule in *Pinnel's Case*, that there was no consideration for the purported accord and satisfaction. They should have concluded that the case was within the general rule that payment of a liquidated and undisputed claim is not consideration for the release of a larger, inconsistent claim.[18]

More significant than the legal mechanics of accord and satisfaction, and apparently of greater weight in inducing the court's decision, was its theory that in such a situation "the relationship between the parties is closely akin to a fiduciary one, and . . . the insurer should be most meticulous and conscientiously scrupulous to protect the rights of the beneficiary and to give every opportunity to fully establish her rights."[19] Moreover, the court imputed lack of good faith to the defendant.[20] The minority vigorously dissented from this

[15] Kellogg v. Iowa State Traveling Men's Ass'n, 29 N.W. 2d 559, 570 (Iowa, 1947).

[16] Ibid., at 573.

[17] De Soto Life Ins. Co. v. Jeffett, 196 S.W. 2d 243 (Ark., 1946); Woodmen of the World Life Ins. Society v. Smauley, 153 S.W. 2d 608 (Tex. Civ. App., 1941); American Life Ins. Co. v. Williams, 234 Ala. 469, 175 So. 554 (1937); Buel v. Kansas City Life Ins. Co., 32 N.M. 34, 250 Pac. 635 (1927); Knights Templar Mason's Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N.E. 1066 (1904).

[18] American Life Ins. Co. v. Williams, 234 Ala. 469, 175 So. 554 (1937); Dodt v. Prudential Ins. Co., 186 Mo. App. 168, 171 S.W. 655 (1914); Weidner v. Standard Life and Accident Ins. Co., 130 Wis. 10, 110 N.W. 246 (1906); Barr v. Clinton Bridge Works, 179 Iowa 702, 161 N.W. 695 (1917); 112 A.L.R. 1219, 1241 (1938).

[19] Kellogg v. Iowa State Traveling Men's Ass'n, 29 N.W. 2d 559, 568 (Iowa, 1947).

[20] Ibid. The court added: "While it is and should always be the policy of the courts to encourage the amicable settlement of all controversies, it is even more a matter of good policy and good morals to stamp the law's disapproval upon settlements which bear the taint of fraud and undue advantage." Ibid., at 574.

view on the traditional theory that under such circumstances the parties deal at arm's length and that the company's only duty is to deal uprightly.[22] The minority inferred from the evidence, based upon the proofs of loss, that the defendant had every reason to believe that the insured died of heart disease and that the beneficiary had made an informed, well-considered bargain in view of the insured's previous medical history.

It is apparent that the reason why the court raised a fiduciary obligation, against the great weight of authority, was that general policy notions of fairness and the unequal position of the parties influenced its consideration of the case. The court said:

> This was not a simple dispute between two persons on even terms over the amount of an account for wages or merchandise. The insurer is always the dominant party in a transaction of this kind. It is always far better informed respecting the facts and the law than the beneficiary, particularly the widow who has just lost her husband. His income has stopped and there is always the burial expenses. Money is needed and an offer of $500 is a temptation that is often irresistible. The fact that the insurer seeks to force a settlement is a most significant item of evidence as to its good faith.[23]

The court thus articulated a concept which, if legally sufficient and if supported by the facts, should have governed the case whether or not there was consideration for the release of the claim. Even where contracts are supported by consideration they are not enforced in cases of duress, fraud, misrepresentation, nondisclosure in some relationships, mistake, impossibility, forfeiture, and similar circumstances. Of course, if the imputation of bad faith and of inequality of information and bargaining position was not justified, the case was unfairly decided. But an assumption that the evidence warranted the court's position leads to the inference that the decision was placed on narrow and much criticized technical grounds because the court had no confidence in the legal sufficiency of its real major premise—that the unequal bargaining position of beneficiaries under insurance contracts should be compensated by imposing a fiduciary obligation on insurers.

Contemporary writers on contract theory agree that regardless of the consideration doctrine the enforcement of promises should be governed by intelligible and useful social policies.[24] However, the courts have been very reluctant, as was the court in the instant case, to impose new fiduciary duties as the basis of decisions or to set aside agreements squarely on such explosive policy grounds as inequality of bargaining power.

The basic problem of economic inequality which underlies the problem of unequal bargaining power is so complex and goes so deeply into the roots of our social order that the traditional logic of the judicial function precludes its consideration in the decision-making process. Lawyers generally feel that the

[22] Ibid., at 578. [23] Ibid., at 568.

[24] Sharp, Pacta Sunt Servanda, 41 Col. L. Rev. 783, 785 (1941); Hays, Formal Contracts and Consideration: A Legislative Program, 41 Col. L. Rev. 849, 853 (1941); Llewellyn, Common Law Reform of Consideration: Are There Measures?, 41 Col. L. Rev. 863, 871 (1941).

courts must accept the basic postulates of our society, which include economic inequality and consequent inequality of bargaining power. It is true that there are certain established exceptions,[24] but most lawyers believe that unless the courts accept the basic facts of inequality, the unity of the law will be destroyed, and with it will be destroyed the logical basis of socially reasonable expectations.

Such considerations as these impel the courts occasionally to utilize available mechanical doctrines to obscure the real kernel of decisions. If inequality of bargaining power were to be given substantial consideration by courts in determining the enforceability of contracts, the classical notion of freedom of contract would have to be revised. One writer, with particular regard to insurance contracts and standardized contracts generally, has proposed as much, maintaining that freedom of contract must mean different things for different types of contracts.[25] In the instant case such a proposition was obviously the inarticulate premise of the court when it spoke of the existence of a fiduciary relationship between the parties. Articulation of the premise, and its utilization as a basis of decision, would require a frank admission that the ordinary consideration doctrine is not suited to insurance contracts or contracts settling insurance claims, in view of the peculiar inequality that often exists between the parties: In making insurance contracts there is little or no bargaining over the terms of the contract—the insured must take it or leave it; in making settlements the insured is often hard pressed for cash and cannot tolerate the same cost, delay, vexation, and hazards of litigation that mean little to the corporate insurer; and in both cases there may be a profound inequality of information and of competent advice.

Courts have already created a bulge in the classical notion of freedom of contract in cases of this type by broad application of well established doctrines such as fraud, mistake, and duress.[26] Decisions in this field should be based directly on the acceptance of a quasi-fiduciary of fiduciary relation between the parties rather than upon mechanical doctrines into which the facts must frequently be tortured in order to avoid patent injustice. In another recent insurance case, Judge Clark, concurring, wrote: "[A] result placed not squarely upon inequity, but upon interpretation, seems sure to produce continuing uncertainty in the law of insurance contracts."[27] If the Iowa Supreme Court in the instant case

[24] Hale, Bargaining, Duress, and Economic Liberty, 43 Col. L. Rev. 603 (1943); see the dissenting opinion of Justice Frankfurter in United States v. Bethlehem Steel Corp., 315 U.S. 289, 326 (1942).

[25] Kessler, Contracts of Adhesion—Some Thoughts about Freedom of Contract, 43 Col. L. Rev. 629, 642 (1943).

[26] The Illinois Supreme Court, for example, has been particularly liberal in invalidating, unconscionably obtained releases. See Woodbury v. United States Casualty Co., 284 Ill. 227, 120 N.E. 8 (1918); Some Aspects of the Law of Release of Claims in Illinois, 5 Univ. Chi. L. Rev. 455 (1938).

[27] Gaunt v. John Hancock Mutual Life Ins. Co., 160 F. 2d 599, 603 (C.C.A. 2d, 1947) noted in 15 Univ. Chi. L. Rev. 379 (1947).

really believed that the defendant had exceeded the permissible limits of bargaining zeal, or had taken advantage of the beneficiary's ignorance, it might have brought the case within the boundaries of fraud, mistake, or duress, or it might have gone one step further to make use of the fiduciary concept which it set forth. Instead, it took elaborate pains to fit the facts into the rigid mold of the rule in *Pinnel's Case*. The slight additional bulge that extensive use of the fiduciary concept might make in technical contract doctrines would be justified by the resulting clarity, flexibility, and fairness in the law.

LIMITATION ON MINORS' COMMON LAW POWER TO DISAFFIRM CONTRACT

In response to a problem presented by the motion picture industry, the California legislature provided in 1927 that "[a] minor cannot disaffirm a contract otherwise valid to perform or render services as actor, actress, or other dramatic services where such contract has been approved by the superior court of the county where such minor resides or is employed. . . ."[1] In 1941 the section was amended to include within its provisions contracts for the services of professional athletes.[2] Twenty years after its enactment, the constitutionality and application of the statute were challenged in *Warner Bros. Pictures, Inc. v. Brodel*.[3]

In 1942, when 17 years of age, Miss Brodel, known professionally as Joan Leslie, entered into a contract with Warner Brothers Studios which was subsequently approved by the Superior Court of Los Angeles under the statute. The contract provided that Miss Brodel should perform as a motion picture actress for one year and that Warner Brothers should have six successive options, exercisable over a six-year period, permitting the employer at the end of each year to extend the time of employment for an additional period of 52 weeks. On February 20, 1946, within a month after reaching her majority, Miss Brodel attempted to disaffirm the contract. In a subsequent suit to enjoin this alleged breach of contract, the California Supreme Court upheld the validity of the contract and the option to extend, and Miss Brodel was enjoined from her attempted disaffirmance.

In defending against the suit for injunction, Miss Brodel contended that the Superior Court had approved only the first year's contract, and, under the statute, lacked jurisdiction to approve any options for its extension. Although the trial court, the District Court of Appeals, and two members of the Supreme Court agreed with this position, the majority decision in the instant case rejected such a construction as contrary to the legislative intent.[4] The defendant also

[1] Cal. Stat. 1927, c. 876, p. 1917.

[2] Cal. Civ. Code Ann. (Deering, 1941) § 36.

[3] 192 P. 2d 949 (Cal., 1948).

[4] The California legislature indicated its disapproval of the decision by the District Court of Appeals, Warner Bros. Pictures v. Brodel, 179 P. 2d 57 (Cal. App., 1947), by amending

argued that the act applied only to "minors" and thus did not bar the disaffirmance of a contract by one who had reached his majority—though the contract was made when he was a minor; as concluded by the appellate court, "the state did not have power, if it had so attempted, to deny her that right upon her reaching majority."[5] The latter contention is untenable. Although the power of the state to regulate the affairs of a minor has traditionally been recognized as resting on the doctrine of *parens patriae*, the state's power to regulate the contractual affairs of all persons, infant and adult alike, has also been recognized on other grounds. Hence, any such regulation is valid so long as it does not violate some provision of the federal or the state constitution.[6]

The Constitution of the United States prohibits the states from passing any laws impairing the obligation of contracts.[7] Commercial pressure for the enforcement of contracts caused insertion of this clause into the Constitution, and the cases arising under this section have reflected this pressure by recognizing uniformly the power of the states to enlarge the area of enforceability.[8] It is therefore unreasonable to contend that the state is impotent to make enforceable against an adult a contract entered into during his minority. An interpretation of the California statute as limiting the effect of court approval of an infant's contract to his minority, excluding acts of disaffirmance after he reaches majority, is unjustified in the light of the legislative history of a statute which was enacted for the specific purpose of protecting the investments made by moving picture companies in the training and promotion of juvenile actors. Such protection would to a large extent be illusory if juvenile stars could break their contracts freely even though they had been found fair and adequate by the approving court. A person's right to disaffirm contracts entered into during infancy within a reasonable time after attaining majority seems merely an extension, for the convenience of the former infant, of his premajority right. Once the latter has been done away with by court approval under a concededly valid statute, the only logical holding is that the former is entitled to no special protection and should disappear as well.

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§ 36 (2) specifically to include options for extensions and other accessory provisions, Cal. Civ. Code (Hillyer-Lake, 1947) § 36 (2). The majority of the Supreme Court considered this amendment as further support for its determination of the original legislative intent. The two dissenting judges, however, felt that subsequent amendments were irrelevant to such a determination.

[5] Warner Bros. Pictures v. Brodel, 179 P. 2d 57, 70 (Cal. App., 1947).

[6] The arguments that barring the right of disaffirmance of actors and professional athletes was a denial of equal protection of the laws and a violation of the provision of the California Constitution against special legislation were rejected on the usual ground that the legislature is not required to remedy all evils at once. Warner Bros. Pictures v. Brodel, 192 P. 2d 949, 955 (Cal., 1948).

[7] U.S. Const. Art. 1, § 10.

[8] Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934); Ogden v. Saunders, 12 Wheat. (U.S.) 212 (1827); Sturges v. Crowninshield, 4 Wheat. (U.S.) 120 (1819).

Unfortunately, this local reform with respect to a particular situation is minor in comparison with the generally unsatisfactory state of the law of infants' transactions. Both the common-law and statutory provisions have been discussed and analyzed by a number of authors.[9] The common law protects the minor against his own improvidence, inexperience, and indiscretion by placing his affairs in the hands of a guardian, whose agreements, however, do not bind the ward. Infants over the age of six have the legal capacity to enter into contracts with adults. Although these agreements are binding on the adult, they are voidable, with certain exceptions, by the infant. Under this system, a minor is not only protected against the effects of his own improvidence and inexperience, but is able to speculate at the expense of the adult party.[10] He can do so until he reaches his majority and for a "reasonable" time thereafter, which under prevailing judicial practice may be a period of considerable duration.[11] This exceedingly favorable treatment of the infant is an obvious deterrent to adults from entering into any transactions with infants. Anyone who has to transact any business concerning a minor's property is safe only if he deals with the guardian, who is personally liable for any transactions made by him.[12] In cases of emergency not permitting delay for action by the guardian, the infant may bind himself under the "necessaries rule" for the reasonable value of the goods or services he obtains.[13] One who wishes to engage a minor's personal services ought to deal neither with the minor nor with his guardian, but only with the parent, because only the parent is entitled to his child's services and earnings.[14]

Following the example of the civil law[15] a considerable number of states have supplemented the common-law rules by statutory provisions empowering an appropriate court, in proper cases, to declare a minor to be invested with full or partial power to enter into binding transactions.[16] In that way a minor of suffi-

[9] The common law of infants' contracts is exhaustively discussed in 1 Williston, Contracts §§ 222–48 (rev. ed., 1936). American statutory provisions are comprehensively and analytically discussed in 5 Vernier, American Family Laws § 273 (1938); Vernier, American Family Laws § 273 (Supp., 1948); N.Y. Law Rev. Comm'n Legis. Doc. No. 651 (1938); Statutory Problems in the Law of Minors' Contracts, 48 Col. L. Rev. 272 (1948).

[10] Sternlieb v. Normandie Nat'l Securities Corp., 263 N.Y. 245, 188 N.E. 726 (1934); Liability of the Infant in Contract, 20 Iowa L. Rev. 785 (1935).

[11] It can never, however, exceed the period of the statute of limitations. Taylor v. Fleming, 68 Mich. 185, 35 N.W. 902 (1888).

[12] The guardian may reimburse himself out of his ward's estate if the court under whose authority he is acting approves the transaction as reasonable.

[13] The common-law rule that a minor may make himself liable for goods or services necessary to one in his station in life is codified in § 2 of the Uniform Sales Act, in force in thirty-six American jurisdictions. 1 Williston, op. cit. supra note 9, at §§ 240–43.

[14] The Hattie Low, 14 Fed. 880 (D.C. N.Y., 1882).

[15] Almost every civil law jurisdiction follows the model of either the French or the German code. Ger. Civ. Code (1900) §§ 104–15, 1821–22, 1643; Fr. Code Civil (Roblot, 1946) Book I tit. 9, 10, Book III tit. 3; 1 Planiol, Droit Civil (12th ed., 1939) Part III, c. i, La Tutelle.

[16] Ala. Code Ann. (Mitchie, 1940) tit. 27, §§ 13–20; Ark. Ann. Digest (Pope, Supp., 1944) Conveyances, 2, § 1; Fla. Stat. (1941) §§ 62.23–26; Kan. Gen. Stat. (Corrick, 1935) §§ 38–

cient maturity can be enabled to carry on an independent business. In addition, almost every state has some legislation regulating specific limited types of transactions.[17] Unfortunately, several factors decrease the effectiveness of statutory reforms. Legislation of the civil-law type is not universal. Where it does exist, it is not always resorted to,[18] and various abuses occur. Further, the precarious situation of parties dealing with minors is not generally known among the public. Finally, an occasional minor may misrepresent his age. Thus, it happens that unwary adults find themselves exposed to the operation of the common-law rules. The principal devices developed by the courts in their efforts to adapt the ancient rules to modern conditions have been centered around the restoration of the consideration received by the minor as a condition of disaffirmance. They include the status quo rule, the requirement of restoration of any consideration retained by the minor at the time of disaffirmance, and the requirement of restoration of the equivalent of the benefit received.[19]

The need for the peculiar California statute, under which the *Brodel* case was decided, arose out of the fact that a contract relating to personal services of a minor, when made by the parent or guardian, does not give the employer a remedy against the minor himself. Unless the minor has himself been a party, no injunction can be obtained against him when, in breach of a contract existing in favor of one motion picture company, the minor starts to work for a competitor. If, however, the minor has made the contract himself, he can disaffirm it. As a result, a statute was necessary under which the contract would be both enforceable against the minor or ex-minor himself and safe from disaffirmance. The California act fulfils both these purposes neatly.

Would it be desirable to extend its scheme to other areas of infants' contracts? The answer must be no. When an adult has to enter into a transaction concerning the property of a minor, he can be perfectly safe simply by dealing

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110; La. Civ. Code Ann. (Dart, 1947) art. 385–88; Miss. Code Ann. (Supp., 1946) §§1264–68; Okla. Stat. Ann. (1941) tit. 10, §§ 91–94; Tenn. Code Ann. (Mitchie, 1938) §§ 103.70–74; Tex. Ann. Rev. Civ. Stat. (Vernon, 1925) art. 5921–23; Wyo. Comp. Stat. Ann. (1945) §§ 7-501, 7-503. In Arkansas the court may remove the incapacity only of non-resident minors over sixteen, if females, or eighteen if males. Mississippi courts may remove the disability of non-resident minors who have an interest in land in their jurisdiction only in regard to the property, but have general emancipating power over resident minors.

[17] This area has been surveyed comprehensively in a recent note, Statutory Problems in the Law of Minors' Contracts, 48 Col. L. Rev. 272 (1948).

[18] Samuels, Special Legislation Removing Disabilities of Infancy, 15 Tenn. L. Rev. 655 (1939), presents the spectacle of state legislators logrolling special bills of emancipation in utter disregard of existing provisions for judicial emancipation.

[19] There is some conflict among the authorities whether the status quo rule or the rule requiring restoration of such consideration as the minor retains at majority is the prevailing common-law rule. 1 Williston, op. cit. supra note 9, at § 238; 3 Page, Contracts, § 1617 (2d ed., 1920). The "benefit rule" has been developed by the courts in New Hampshire and Minnesota and seems the most equitable. Berglund v. American Multigraph Sales Co., 135 Minn. 67, 160 N.W. 191 (1916); Hall v. Butterfield, 59 N.H. 354 (1879); Modern Limitations upon the Infant's Power to Disaffirm His Contracts, 81 U. of Pa. L. Rev. 731 (1933).

with the guardian. If the infant does not have a guardian, an application to have one appointed can be made at any time to the proper court. Where it is desirable to satisfy the intention of an infant to set out for himself in a business in which he will have to make an indefinite number of agreements and transactions, the simple statutory remedy is judicial emancipation upon the pattern mentioned above.[20] No necessity exists, within the framework of American law, for interposing a court's discretion for that of a judicially supervised guardian. The only exception[21] is a contract for a minor's personal services; in this one situation intervention by a court as provided by the California statute is justified because of the lack of any other adequate solution.

WAIVER OF CONSTITUTIONAL GUARANTEE RELATING TO PLACE OF CRIMINAL TRIAL

The defendant was indicted by a South Dakota grand jury for forging a postal money order in that state. After her arrest in Oregon, the accused signed a declaration acknowledging her willingness to file a plea of guilty with the Oregon District Court and to waive her right to trial in South Dakota, as provided by Rule 20 of the Federal Rules of Criminal Procedure.[1] Upon presentation of the guilty plea the Oregon court held that the constitutional provision for place of trial is not a personal right subject to waiver and that "the place of indictment, trial, and sentence in the state and district where the act was committed is part of the jurisdictional structure of each of the federal trial courts." Rule 20 was therefore declared a violation of Article 3, Section 2,[2] and the Fifth and Sixth Amendments to the Constitution. *United States v. Bink.*[3]

The right to trial by a jury selected from the vicinage has been secured by the common law since the Magna Charta, but, like other common-law rights, has been subject to change by statute. Acts of Parliament transferring the place of trial from one county to another,[4] particularly where the crime was a serious

[20] Note 16 supra.

[21] Special problems arise in regard to infants' contracts of employment both because the parent is entitled to the earnings of the child and because the remedy is frequently inadequate unless the minor can be prevented from breaching the contract; cf. Cal. Civ. Code (Hillyer-Lake, 1947) § 34.

[1] "A defendant arrested in a district other than that in which the indictment or information is pending against him may state in writing, after receiving a copy of the indictment or information, that he wishes to plead guilty or nolo contendere, to waive trial in the district in which the indictment or information is pending and to consent to disposition of the case in the district in which he was arrested, subject to the approval of the United States attorney for each district. . . ." Rule 20, 18 U.S.C.A. foll. § 687 (Supp., 1947).

[2] "The Trial of all Crimes . . . shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed. . . ."

[3] 74 F. Supp. 603 (Ore., 1947), noted in 46 Mich. L. Rev. 964 (1948); 96 U. of Pa. L. Rev. 443 (1948); 36 Geo. L. J. 263 (1948).

[4] 4 Bl. Comm. *303; see also Blume, The Place of Trial in Criminal Cases, 43 Mich. L. Rev. 59, 60-63 (1944).

felony, were not uncommon.[5] Those provisions of the United States Constitution providing for a trial in the state where the crime was committed are generally thought to be derived from the grievance expressed in the Declaration of Independence against "transporting us beyond Seas for pretended offenses."[6] The hostility of the colonists, however, was directed less toward the change in venue provided in the case of felonies and capital offenses than toward the summary removal to England for trial on treason charges.[7]

Another historical justification for the "local" character of the jury is the theory that such a jury, with its peculiar knowledge of local conditions, would also protect the accused.[8] But the present operation of the jury system places a premium upon the lack of information concerning the case.[9] Since the jury itself can be waived,[10] there appears to be slight justification in a refusal to allow waiver of the protection of the "local" character of the jury as well.

Historically, then, the constitutional provision for trial by a jury of the vicinage was primarily intended as a protection against infringement of the

[5] For example, if a murder was committed in Wales, trial could be had in England at the option of the king. 26 Hen. VIII, c. 6 (1534). Similar removal to England was provided from Newfoundland, 10 & 11 Wm. III, c. 25 (1699), for murder, and from the Massachusetts Bay Colony for murder arising from suppression of a riot or enforcement of revenue laws. 14 Geo. III, c. 39 (1774).

[6] One writer believes that the only basis for this grievance was the statute of 14 Geo. III, c. 39 (1774). Stimson, Conflict of Criminal Laws 28 n. 69 (1936). By this Act the governor of Massachusetts Bay Colony was authorized in the case of an officer or magistrate indicted for a crime arising from the enforcement of the revenue laws or suppression of riots, to direct that the trial be held in another colony or in England when it appeared that an impartial trial could not be had. It seems clear, however, that the word "us" in the phrase "For transporting us . . ." refers to the American Colonists—not the king's officers or magistrates whose protection was promoted by the provision for a trial outside the hostile Massachusetts Bay Colony. It was undoubtedly the statutes relating to treason outside the realm which lead to this grievance. 26 Hen. VIII, c. 13 (1534), 33 Hen. VIII, c. 23 (1541), 5 & 6 Edw. VI, c. 11 (1552), and especially 35 Hen. VIII, c. 2 (1543).

[7] Blume, The Place of Trial in Criminal Cases, 43 Mich. L. Rev. 59, 65 (1944).

[8] "Where jurors can be acquainted with the characters of the parties and the witnesses,—where the whole cause can be brought within their knowledge and their view,—I know of no mode of investigation equal to that of a jury." 2 Elliot, Debates on the Constitution 516 (2d ed., 1836). Mr. Pendelton said in reply to Mr. Henry, "I think the . . . gentleman was mistaken . . . in his reasoning on the propriety of a jury from the vicinage.

"He supposed that a jury from the neighborhood is had from this view—that they should be acquainted with the personal character of the person accused. I thought it was rather another view—that the jury should have some personal knowledge of the facts, and acquaintance with the witnesses, who will come from the neighborhood." 3 Ibid., at 546. Still another spokesman contended, "We know that trial by jury of the vicinage is one of the greatest securities for property. If causes are to be decided at such a great distance, the poor will be oppressed; in land affairs particularly, the wealthy suitor will prevail." 4 Ibid., at 154.

For a recital of the history of the nature of venue see United States v. Parker, 19 F. Supp. 450, 457–60 (N.J., 1937); Orfield, Criminal Procedure from Arrest to Appeal 366–76 (1947); 4 Holdsworth, History of English Law 530 (2d ed., 1937); 1 Stephen, History of the Criminal Law of England 276 (1883).

[9] United States v. Parker, 19 F. Supp. 450, 458 (N.J., 1937).

[10] Patton v. United States, 281 U.S. 276 (1929).

personal rights of the accused and not as an inherent segment of the jurisdictional structure of the judicial system. Classification of this protection with other clauses which have been held subject to waiver, although inserted in the Constitution for the protection of defendants in criminal prosecutions, is therefore reasonable. Thus, a defendant may waive his right to jury trial,[11] his right to the assistance of counsel,[12] his right to confrontation of witnesses,[13] his protection against double jeopardy,[14] his privilege against self-incrimination,[15] his protection against unreasonable search and seizure,[16] and his right to speedy trial.[17] Although the Supreme Court has never interpreted the vicinage provision of Article 3, Section 2, it has held that the right to trial by jury provided in the same clause "is not jurisdictional, but [is] meant to confer a right upon the accused which he may forego at his election."[18] Since the jury itself may be waived entirely, it seems unreasonable to argue that an accused cannot waive the provisions concerning local trial when he desires no trial at all,[19] but simply wishes to enter a plea of guilty.

In similar situations the authority of United States tribunals to render judgment has been recognized where the defendants were charged in one state with having violated a federal criminal statute in another state. This power is said to arise from a combination of Section 24 of the Judicial Code[20] with the defendant's waiver of his constitutional right to trial in the state where the crime was committed. Thus, in *Hagner v. United States*[21] the accused was indicted and tried in the District of Columbia for a crime committed in Pennsylvania. The jurisdiction of the trial court was attacked for the first time on appeal, but the appellate court held that the defendants had waived their privilege. The Second[22] and Tenth Circuit Courts[23] of Appeal have recently reached the same con-

[11] Ibid.

[12] Adams v. United States, 317 U.S. 269 (1942); Johnson v. Zerbst, 304 U.S. 458 (1938).

[13] Diaz v. United States, 223 U.S. 442 (1912); Grove v. United States, 3 F. 2d 965 (C.C.A. 4th, 1925), cert. den. 268 U.S. 691 (1925).

[14] Trono v. United States, 199 U.S. 521 (1905).

[15] United States v. Murdock, 284 U.S. 141 (1931); Powers v. United States, 223 U.S. 303 (1912); Fitzpatrick v. United States, 178 U.S. 304 (1900).

[16] Zap v. United States, 328 U.S. 624 (1946), judgment vacated on rehearing on other grounds, 330 U.S. 800 (1947).

[17] Collins v. United States, 157 F. 2d 409 (C.C.A. 9th, 1946); Pietch v. United States, 110 F. 2d 817 (C.C.A. 10th, 1940), cert. den. 310 U.S. 648 (1940).

[18] Patton v. United States, 281 U.S. 276, 298 (1929).

[19] For a discussion of whether a "trial" occurs when a plea of guilty is entered, see Rule 20 of Federal Rules of Criminal Procedure, 46 Mich. L. Rev. 964, 967 (1948).

[20] "The district courts shall have original jurisdiction as follows: . . . Second. Of all crimes and offenses cognizable under the authority of the United States." 36 Stat. 1091, § 24 (1911), 28 U.S.C.A. § 41(2) (Supp., 1947).

[21] 54 F. 2d 446 (App. D.C., 1931), aff'd on other grounds 285 U.S. 427 (1932).

[22] United States v. Jones, 162 F. 2d 72 (C.C.A. 2d, 1947).

[23] Mahaffey v. Hudspeth, 128 F. 2d 940 (C.C.A. 10th, 1942), cert. den. 317 U.S. 666 (1942).

clusion in holding that the place of trial presents a problem of venue and not one of jurisdiction, so that the right may constitutionally be waived.

Since under this theory Section 24 gives all federal district courts jurisdiction over the subject matter of the *Bink* case, the effectiveness of the waiver under Rule 20 remains the only question. Any decision as to whether to class this right as personal or jurisdictional should depend on the historical reasons for including the right in the Constitution and not on the use of the classification itself to preclude further discussion. The magic in the word "jurisdiction" should not cloud the real question discussed above: Is this protection of a local jury a personal right or a mandatory requirement which cannot be waived?

As an alternative ground for its decision, the court pointed out that "jurisdiction of a federal court to enter judgment must always be found in the written words of the Constitution, treaties, or statutes of the United States."[24] As a result, the court concluded that both the failure and inability of Rule 20 expressly to grant jurisdiction to the district court in the state of arrest deprived that court of power to enter judgment. Considerable force is added to this reasoning by the recent declaration of the United States Supreme Court in *Ahrens v. Clark* that "[w]e start from the accepted premise that apart from the specific exceptions created by Congress the jurisdiction of the district courts is territorial."[25] Although the Court's primary concern in the *Ahrens* case was with extra-territorial jurisdiction over the subject matter, the only decisions cited to support its assertion dealt with jurisdiction over the person.[26] Despite the seeming lack of direct authority to establish this "accepted premise," however, the Court's statement must be construed as requiring specific extra-territorial powers of the district court in the present case.

Implicit in the decisions of the three circuit courts which have held that federal trial courts have jurisdiction over crimes committed in other states[27] is the notion that Section 24 of the Judicial Code creates such a specific exception to the normal territorial limitations. Justification for this doctrine was allegedly found in the Supreme Court's opinion in *Patton v. United States:* "[Section 24] is a broad and comprehensive grant, and gives the courts named power to try every criminal case cognizable under the authority of the United States, subject to the controlling provisions of the Constitution."[28] But the *Patton* case did not involve the problem of extra-territorial jurisdiction so that the reference to "every criminal case" does not indicate a widened scope of territorial jurisdiction.

[24] United States v. Bink, 74 F. Supp. 603, 611 (Ore., 1947).

[25] 68 S. Ct. 1443, 1444 (1948).

[26] Georgia v. Pennsylvania R. Co., 324 U.S. 439, 467 (1944); Robertson v. Railroad Labor Board, 268 U.S. 619, 622–23 (1925).

[27] United States v. Jones, 162 F. 2d 72 (C.C.A. 2d, 1947); Mahaffey v. Hudspeth, 128 F. 2d 940 (C.C.A. 10th, 1942), cert. den. 317 U.S. 666 (1942); Hagner v. United States, 54 F. 2d 446 (App. D.C., 1931), aff'd on other grounds 285 U.S. 427 (1931).

[28] 281 U.S. 276, 299 (1929).

In addition, all three circuit courts overlooked the next paragraph in the *Patton* decision, which disclosed that the original statute from which Section 24 is derived limited the jurisdiction of the district courts to crimes "committed within their respective districts."[29] The circuit courts were given jurisdiction concurrent with the district courts over "all crimes" against the United States. Then, when the circuit courts were abolished in 1911, the two jurisdictional statutes were merged in Section 24. If the adoption of the phrase over "all crimes" and the failure to reenact the territorial limitation in the new statute had indicated congressional intent to create extra-territorial jurisdiction, the change would have been a major one. The lack of discussion of any such possibility in the congressional records and journals points rather to a change in the form of the statutory language than to any deliberate change in meaning. Thus, the basis for the reasoning of the three circuit courts is apparently erroneous, and some other source of the necessary "specific exception" must be sought.

The possibility that Rule 20 itself can fulfil this requirement is slim. The government, in its brief in the *Bink* case,[30] specifically rejected the argument that Rule 20 enlarges the jurisdiction of the district courts, because the enabling act empowers the Supreme Court only to prescribe ". . . rules of pleading, practice, and other procedure. . . ."[31] Any other position would clearly violate the normal rules of statutory construction.

Since the enabling act requires that the rules be reported to Congress before they can become effective,[32] it might also be argued that the silence of Congress in regard to Rule 20 operated to give the Rule the force of legislation. But comparison of this case with situations in which the Supreme Court has applied the doctrine of congressional "ratification" of action by other agencies of government[33] discloses the lack of an essential procedural step: the submission of congressional action to the executive before it can become effective. The absence of one element of the law-making process is fatal to any ratification argument.

The free operation of Rule 20 would without doubt accomplish its purpose of giving "to a defendant in such a situation an opportunity to secure a disposition of the case in the district where the arrest has taken place, thereby relieving him of whatever hardship may be involved in removal to a place where the prosecu-

[29] "That the district courts shall have, exclusively of the courts of the several States, cognizance of all crimes and offenses that shall be cognizable under the authority of the United States, committed within their respective districts. . . ." 1 Stat. 76 (1789), U.S. Rev. Stat. § 563 (1875).

[30] Brief for the United States in support of transfer proceedings from the United States District Court for South Dakota to the United States District Court for Oregon, at 15–16.

[31] 54 Stat. 688 (1940), 18 U.S.C.A. § 687 (Supp., 1947).

[32] "Such rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session, and thereafter all laws in conflict therewith shall be of no force and effect." Ibid.

[33] Hirabayashi v. United States, 320 U.S. 81, 91 (1943), and cases there cited.

tion is pending."[34] The decreased cost and increased efficiency in the administration of criminal justice which would result from the rule are also relevant considerations. It is true, of course, that partners in crime sentenced in different courts may receive different sentences. But more realistically, the fact that an indictment cannot be transferred without the consent of both United States attorneys would operate as an effective check on any possible abuse. The arguments of convenience and expediency clearly outweigh the position that trial by a "local" jury is of jurisdictional significance, especially since the right to a local trial may be classified historically with the right to trial by jury as a personal protection to the defendant.

Despite the constitutionality of a provision allowing waiver of place of trial such as that contained in Rule 20, the Supreme Court's language in the *Ahrens* case apparently requires additional legislation to furnish a specific exception to the territorial limitation on jurisdiction over the subject matter. At present, neither Section 24 of the Judicial Code nor Rule 20 itself serves as adequate indication of congressional intent to create such an express provision.

[34] Notes of Advisory Committee on Rules following Rule 20, Federal Rules of Criminal Procedure, 18 U.S.C.A. foll. § 687 (Supp., 1947).

BOOK REVIEWS

Decedents' Estates, Cases and Other Materials on. By Max Rheinstein. Indianapolis: The Bobbs-Merrill Co., 1947. Pp. xiii, 1295. $10.00.

Mr. Rheinstein's *Cases on Decedents' Estates* can claim the distinction, quite rare among current casebooks, of a wholly novel approach. In addition, the job has been most expertly done. Nevertheless it is to be expected that some advanced thinkers in legal education will think it presumptuous of him to have done it at all. The subject commonly (or formerly) known as "Wills" or "Wills and Administration" is at the present time much in disrepute. A number of schools have abandoned it altogether. Mr. Leach has prepared a brief casebook, now in its second edition, which reduces the subject to a one-hour course and is intended to serve simply as a deferential introduction to the important mysteries of Future Interests. In a stimulating review of a number of recent books, including Mr. Leach's and Mr. Rheinstein's, Mr. Bordwell admits to grave doubts as to the need of a two- or three-hour course in "Wills and Administration" as well as to the propriety of the name. So, Mr. Rheinstein has two strikes against him at the start.

The present reviewer makes no bones about admitting that he has a stake, professional and pecuniary, in the course on Wills. The reader is free to assess to his own taste the extent to which that colors the reviewer's views on the merits of such a course. That admitted, the reviewer proceeds to state that he thinks there is a definite place in the curriculum for a course on Wills. Why not?

Particularly in smaller communities the handling of estates is, and is likely to continue to be, one of the most important, lucrative, and useful portions of the average lawyer's practice. People may be too timid, too peaceful, or too thrifty to sue their neighbors or divorce their wives, but they can't help dying; and if they have been timid, non-litigious, and thrifty, they are likely to leave estates. It is important to them and to the community that their estates be settled as expeditiously, efficiently, and economically as possible. It may be even more important to the community that its lawyers be adequately trained to assist its property owners in planning wills (or intestacies) that will most satisfactorily exercise their right to control the disposition of their estates.

These skills are best taught in a course on Wills. The average testator will probably not wish to set up a trust or to provide for a congeries of future estates, but he will have to dispose of real and personal property, and will be lucky if he is advised to make a will which is so drawn as to minimize the dangers which threaten the simplest will. Some one must warn him of the risk of thinking in terms of the present and the specific, some one must point out to him what is likely to happen to a legacy of "my General Motors stock" or "my money in the First National Bank," and some one must see to it that he charges his land with his legacies and doesn't provide for his wife and children by a residue that turns out to be non-existent. These are humble matters from the standpoint of the New York and Washington lawyers whose ideas are so conspicuous in legal education at the moment; but they are, in the long pull, important matters. People in lesser communities matter, too, and the advance sheets offer full and

eloquent testimony to show that their lawyers are shockingly ill-prepared to advise their clients in just such humble matters. This perhaps suggests that the subject of Wills hasn't been as well taught as it should be, but it hardly affords a basis for saying it shouldn't be taught at all.

The writer believes that there are fashions in courses as there are in other things. Currently, Wills is out of fashion, like plus-fours and the Airedale. Probably Taxation is the present darling of the curriculum. Many schools offer not merely a single course but separates ones in Garden, Income, and Inheritance Taxation. Might not this be said to be mainly mechanical and informational matter—a charge frequently leveled at Wills? Does it tend to inculcate "Policy-making" (another darling of the day)? Is it any more productive of the broad and civilized lawyer than any other intensive study of small details? But students hear that there is lots of money to be made in Taxation, and they flock to patronize the courses.

Fashions pass. It is possible that Taxation and Labor Law and Corporate Finance may lose their glamour and resume their appropriate place in the curricular picture. It is also quite possible that the law of Decedents' Estates will not disappear from the picture and that in the long run it will be appreciated that the training of lawyers to draft workmanlike wills and to administer estates with maximum expertise and efficiency is not the least of the functions of a law school.

Mr. Rheinstein's new book is highly adapted to foster such an appreciation. For one thing, he is a genuine enthusiast; his enthusiasm is likely to promote enthusiasm in others. In his quite extended "PREFACE, Meant to be Read by Students (and by Professors, too)" he says (at p. vii): "To the student who is going to use this book and to whom I can not talk face to face I wish to say that I, at least, regard the field of decedents' estates as intensely interesting. It is technical in the sense in which engineering is technical; if a machine is to function well one has to attend to its careful design, maintenance, and handling. But the law of decedents' estates is also full of political and human problems. . . . Try your own hand on some problem of drafting and experience the satisfaction of a job well done, the job of preventing strife and quarrel in a family, of forestalling the dissipation of an estate, and of thus serving your community."

In addition to being an enthusiast, Mr. Rheinstein writes from a very profound background of knowledge as to the comparative law of succession; he has both the Roman and the modern continental law at his finger tips. If any other editor in this field is equally learned, the reviewer is unaware of it; certainly no other casebook shows so unmistakably the consequences of such learning.

These consequences are several. Mr. Rheinstein's critical thought is constantly comparative; he sees every problem not in the light of one method of approach whose soundness is to be taken for granted but in the light of several approaches which, if they conflict, as they often do, need to be appraised with a view to determining the best of them or perhaps of thinking of some new way better than any of them. The terminology is occasionally unfamiliar and, by the same token, thought-provoking. And it may be that the editor's great and varied fund of information has influenced somewhat the size and form of the book. Mr. Rheinstein is palpably unable to see his topic as a small and neat unit capable of being readily polished off. To him it is a vast field with almost unlimited ramifications and affinities; it must be realized as such, however small be the segments selected for detailed study.

It follows as of course that the book is extraordinarily interesting. To this reviewer it is the most stimulating and unusual specimen of a casebook he has seen in a long time. There is nothing like it in the field; the reviewer knows of nothing quite like it in any field. Exactly what sort of book is it? That is difficult to answer. Without quoting the entire table of contents (it is five pages long) it is hard to suggest with accuracy the exact nature and flavor of the book. However, consider, for example, Section 2 of Chapter 26, entitled "Effects of Adjudication as Between Persons Claiming Under Different Titles." This commences with a two-page case which is followed by a three-and-a-half-page footnote, summarizing and quoting at length three cases. This is followed by two cases, separated by a very brief note. The second of the cases is followed by a note nearly a page long, which is a quotation from a law review article. Then follows a long case which in turn (concluding the section) is followed by a six-page note; the bulk of this is made up of a translated excerpt from an article by Professor Dernberg of the University of Berlin on "Immoral Abuse of Res Judicata," but it also includes the quotation of several sections of the Restatement of Restitution and the extended summarization of, and quotation from, a number of cases. Mr. Rheinstein sensibly and mercifully has his notes printed in large size type; this involves a technical problem which he has not always handled successfully (as who has?), namely, that of making clear, typographically, the nature and provenience of the note material. Occasionally it is hard to tell whether one is reading Mr. Rheinstein's statement of his own opinions and findings, a quotation from a case, or an excerpt from a law review article. See, for example, page 55, where an "Intestacy Act" is set forth, with comments and questions. It does not appear whether the act is proposed or enacted, or by whom, nor who is the author of the comments and questions.

This necessarily inadequate attempt to give some idea of the character of the book suggests some of the practical questions sure to arise. The author must have considered and faced them; he can have no objection to a statement of them by a reviewer. American law professors are, it is to be feared, an extremely conservative lot. They have not, as far as the reviewer can tell, been very cordial to novelties in casebook substance or form. Such novelties are commonly reviewed with admiration, or at least with cautious respect, and then put on the shelf by most teachers to be glanced at from time to time as reference works. Mr. Rheinstein's book may mislead them. Much of it varies really very little from the norm as far as substance goes, but is merely set up and captioned so as to appear unusual. Will teachers go beneath the surface? Again, Mr. Rheinstein's notes not infrequently imply or even state the view he takes of the topic at hand. This, to the reviewer, is as it should be. The editor of a casebook will normally have devoted years of study to the subject; if he is any good he will have ideas on it worth knowing. Why should they be sedulously withheld from users of his casebook, or (to mention one of the supreme absurdities of current legal pedagogy) concealed from the students who buy and pay for the book—but privately supplied to teachers in the form of a "pony," apparently on the interesting assumption that while the students are supposed to read the cases in the book and deduce from them the "law" of the subject, the teacher won't be able to understand them unless someone explains them to him. Still, an exposition of the editor's opinions remains largely tabu; a foolish prejudice, if you like, but one that must be reckoned with.

Finally, there is the matter of the length of the book: nearly thirteen hundred longer-than-average pages. Mr. Rheinstein makes his position on this quite clear: "Only cer-

tain parts of the book are meant to be 'studied'; others are included only for reading; and still others may well be skipped by the general user and be looked up only by those who are specially interested in a particular set of problems. . . . One point ought to be kept firmly in mind, however. I do not regard it as necessary or even advisable that a course on decedents' estates should cover everything that is covered in this book. Every instructor will have to make a choice which may or may not coincide with that just stated here. For whatever field an instructor may decide to emphasize, however, I hope I have provided him with sufficient material."

This is an honest position; much can be said for it. Much can be said against it, however, and it is feared that it will run counter to the prejudices of the average teacher. A publisher's representative lately said, in substance, to the reviewer: Teachers clamor for shorter books—but when they come to write their own they refuse to keep them down. This particular prejudice the reviewer shares. He is committed by preference and practice to the integrated casebook intended to be used substantially as a whole. It seems to him an important part of the editor's job to delimit and chart the parts of the subject matter which should be studied by the student and to devote the space at his disposal to dealing with those parts so as to suggest best both their interrelations and their relations with parts of the subject which have been excluded as a matter of necessity. However, it is only fair to Mr. Rheinstein to say that in his preface he has given a list of cases which he states to be his own personal choice. This should be immensely helpful to the beginning, or not very experienced, teacher.

These may be humble, even sordid, matters, but they cannot be overlooked. Everyone who still teaches Wills and everyone who has ever written a casebook in any subject will be interested in this one and curious to observe its reception. It is not necessary to add that none of the speculations just set forth are intended to qualify in any way the reviewer's opinion that this is a notable, indeed a brilliant, book, that it deserves success, and that it greatly enriches the literature of the field.

PHILIP MECHEM*

Federal Protection of Civil Rights—Quest for a Sword. By Robert K. Carr. Ithaca: Cornell University Press, 1947. Pp. viii, 284. $3.00.

One gets an eerie feeling reading *Federal Protection of Civil Rights—Quest for a Sword*. Written by Robert K. Carr, Professor of Government at Dartmouth University and recently Executive Secretary of the President's Committee on Civil Rights, it contains a complete, accurate, and highly analytical study of the law governing federal protection of civil rights. The history of that law as it developed under the Reconstruction Amendments is well presented. There is a detailed description of the nine-year history and work of the Civil Rights Section of the Department of Justice and of the problems, legal and political, which it has faced. An appendix supplies the text of past and present federal civil rights laws. The book is certain to be of value to any attorney who has occasion to deal with the thorny problems which it covers so thoroughly.

Still the reader who has any familiarity with the facts with which the law of civil rights is supposed to deal—the widespread and all-pervasive violations of the guar-

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antees of our Constitution—can only be continually reminded by this study of the wide gap between the results of the puny efforts of the Civil Rights Section and the job which really needs to be done. The fact of the matter is that, regardless of what the courts have said, the simple requirements of the Thirteenth, Fourteenth, and Fifteenth Amendments are widely ignored; and these requirements are not ignored merely where application of those Amendments is open to question.

The Fourteenth Amendment requires equal treatment of persons of all races and religions by state governments. The Fifth Amendment imposes the same requirement on the federal government. Yet discrimination in government employment in Washington and in every state is a commonplace. The segregated school system is not limited to the South; in the North, where it rests most frequently on segregated housing patterns, schools in Negro districts usually compare unfavorably with those in white districts. Government-financed housing is regularly established on a segregated basis and rarely are the separate facilities equal. The uniform failure of southern states to maintain equality in their segregated parks, recreation grounds, swimming facilities, and other state services is undeniably established.

The Fifteenth Amendment prohibits discrimination in the right to vote. Yet when Mississippi election officials admitted that they placed special burdens on Negroes attempting to vote in the 1946 senatorial primary,[1] no action, civil or criminal, was taken against them. The "Boswell Amendment" in Alabama which requires voters "to understand and explain any article of the Constitution of the United States"[2] is offered by "white supremacy" advocates as the answer to the Supreme Court's white primary decisions[3] on the frank assumption that the tests will be applied discriminatorily.

Nevertheless, Professor Carr's book reads much the same as would a treatise on the subject of larceny, alimony, or powers of appointment. This is no criticism. Professor Carr has accomplished brilliantly exactly what he set out to do. But his study must give the legal profession food for thought. Are the forces of law and order, for which lawyers are largely responsible, really powerless to effectuate the law of the land?

Professor Carr's subtitle, "Quest for a Sword," refers to the fact that constitutional guarantees have been looked on primarily as a shield against oppression by government rather than as a positive weapon to be used by the government to protect individuals from oppression by others. Of course, the failure of the individual states to exercise their ordinary police powers to curb mob action is a potent factor in maintaining the system of second-class citizenship. However, this aspect of the problem can be overemphasized. The prejudices which prompt mob action are reinforced and perpetuated by the acceptance and application of those prejudices by the states in their own affairs. It may be true, as Professor Carr says, that "no express constitutional sanction exists" for federal "sword" action against state inactivity, but there is no doubt as to the power of the federal government to move against affirmative discrimination by the states.

By effectively enforcing the restraints which the Constitution lays exclusively on the states, and by setting its own house in order, the federal government could ac-

[1] Report, Special Committee To Investigate Senatorial Campaign Expenditures, 80th Cong. 1st Sess., Rep. No. 1, pp. 7–8, 17, 20 (1946).

[2] Ala. Const. Amend., Art. 8, § 181.

[3] Smith v. Allwright, 321 U.S. 649 (1944), and cases there cited.

complish a great deal. An expanded and completely reorganized Civil Rights Section under dynamic leadership could, for example, prosecute discrimination by state officials whenever it occurred. It could urge upon the Supreme Court that the decisions of the last century which crippled the administration of the Reconstruction Amendments[4] were wrongly decided. If it did no more than insure to all groups the right to vote, it could make public officials more aware of their duty to protect all, and not merely some, citizens. Professor Carr shows not only that additional legislation would make the task of the Justice Department easier and the scope of its activities more broad, but also that there is ample room for effective action under existing laws.

Furthermore, a uniform policy of nondiscrimination and nonsegregation in federal government activities would set an example of democratic living which would shape attitudes more effectively than any kind of exhortation. The President's Committee on Civil Rights, on which Professor Carr served as Executive Secretary, reported that even a short-lived and limited suspension of the policy of segregation in the United States armed forces during the war made substantial inroads on the prejudices of many of the soldiers who came in contact with mixed Negro and white companies.[5] The present acceptance by the federal armed forces of the policy of segregation has the effect of spreading prejudice to areas where it might not otherwise exist. Adoption of the opposite policy would have the opposite and manifestly desirable effect of reducing existing prejudice.[6] Denial of federal appropriations to all discriminating agencies, whether federal, state, or private, is certainly in accord with accepted constitutional principles.[7]

Vigorous action on the part of the federal government faces many practical obstacles, some of which are described and illustrated in this book. Notable among these is the reluctance of federal and state agencies to investigate, of United States attorneys to prosecute, of juries to indict and convict, and of judges to impose appropriate sentences. These obstacles cannot be overcome by what Professor Carr calls, with convincing supporting evidence, the "unduly cautious" policy of the Civil Rights Section. Summary replacement or removal of recalcitrant attorneys, insistence on nondiscriminatory selection of federal juries, elimination of the pattern of segregation in federal courthouses, prosecutions repeated often enough to arouse community distaste of unjust acquittals—all these largely unused devices are available.

Whether or not to use these devices is primarily a political question. Only a fully

[4] For example, The Slaughterhouse Cases, 16 Wall. (U.S.) 36 (1873); United States v. Harris, 106 U.S. 629 (1883); Civil Rights Cases, 109 U.S. 3 (1883); Plessy v. Ferguson, 163 U.S. 537 (1896).

[5] "To Secure These Rights" 82–85, 87 (Gov't Printing Office, 1947).

[6] This proposal was advocated in the Report issued by the President's Advisory Commission on Universal Training (Gov't Printing Office, 1947), at 42:

"Segregation or special privilege in any form should have no place in the program. To permit them would nullify the important living lesson in citizenship which such training can give. Nothing could be more tragic for the future attitude of our people, and for the unity of our nation, than a program in which our Federal Government forced our young manhood to live for a period of time in an atmosphere which emphasized or bred class or racial differences."

[7] A subcommittee of the House Appropriations Committee inserted a proviso in the 1949 Labor-Federal Security Appropriation Bill barring Federal funds to schools engaging in racial or religious discrimination. The proviso was stricken by the full committee, and an attempt to restore it on the floor of the House, on March 8, 1948, was defeated 40 to 119. 94 Cong. Rec. 2431–32 (1948).

awakened people can obtain the kind of federal action outlined above. The legal profession, however, can and should familiarize both itself and the lay public with the ample powers which the Constitution gives the federal government to halt practices which form an important part of the structure whereby civil rights are denied to many of our fellow-citizens.

JOSEPH B. ROBISON*

Recognition in International Law. By H. Lauterpacht. Cambridge: The University Press, 1947. Pp. xix, 142. $5.50.

This is probably the most exhaustive study of recognition ever published. It is first of all to be noticed that recognition presupposes a congeries of independent states with no superstate in existence. Acknowledgment of the impossibility of a superstate, in which the author had great faith, must have caused him some regret. The work is divided into four parts. Part I discusses the legal nature of recognition and whether it fulfils a declaratory function, as the Institute of International Law supposes, or a constitutive function, as most authors assume. The author leans toward the constitutive view, since no state can have international intercourse without prior recognition. As a matter of fact, it is believed that while recognition is constitutive in that sense, it is also declaratory in assuming the prior existence of the state recognized. The reviewer would go further than the author in insisting upon its legal characteristic. There is responsibility not only to the parent state for premature recognition, but to the new state for tardy recognition. The fact that recognition is both legal and political at the same time should not cause astonishment, for that is true of many international acts. The reason why the legal characteristic has been overlooked is that few cases are known in which responsibility has been claimed, it being difficult to put a money value on such a delinquency. But that there is a duty to recognize a new state, regardless of one's wishes in the matter, cannot be doubted.

Part II deals with the special problems raised by the question of recognizing new governments in existing states. While to some extent the tests for recognizing new states are applicable, some additional problems are raised. The author indicates his allegiance to collective security in the sense that he would have recognition collectivized. It is undoubtedly true that one of the difficulties is that the new state or government exists or acts for more than the specific number of recognizing states. The question always arises whether a non-recognizing state is bound.

Part III deals with the recognition of belligerency and insurgency and the special problems created by those phenomena. Is recognition due the insurgent state or due the recognizing state? Who can claim it as a matter of duty? We are inclined to follow the author in his predilection for duty to both the insurgent and the recognizing state, the latter of which, as a general rule, must have some maritime interests involved. The author pays inadequate attention to the revolution created by Woodrow Wilson's pursuit of Huerta, whom he drove out of Mexico in execution of his quixotic idea that he could make the change of governments in Latin America constitutional. Only a person obsessed with the notion that he could improve international relations—and

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Woodrow Wilson knew very little about history—could inspire the notions that actuated him. The United States had no difficulty in insisting later that Huerta's government was a de facto government of Mexico.

Part IV deals with certain other problems of recognition. When the author speaks of de facto recognition he means recognition of a de facto government, and therefore does not squarely oppose Baty, who denied that there was such a thing as de facto recognition.[1] In this part the author also deals with the withdrawal of recognition and conditional recognition, implied recognition, and the sanction known as non-recognition. The author agrees that recognition cannot imply an approval of the state, government, or party recognized, or non-recognition, disapproval.

Exception must be taken to chapter X of the author's voluminous work, where he approves the British decision in *Luther v. Sagor* and the many decisions of the New York Court of Appeals refusing to give effect to Soviet decrees because the Soviets were not recognized by this country until 1933. The error with respect to the latter stems from the fact that recognition had nothing to do with the case, as the New York Court of Appeals itself admitted in its more recent decisions not noted by the author. It was not lack of recognition which constituted a legal reason for refusing to give effect to Soviet decrees, but the fact that confiscation was contrary to the public policy of the forum. For that reason the courts refused to give confiscation extraterritorial effect, which would have been true and was true even after the Soviets were recognized. The opinion in *Luther v. Sagor* was erroneous because the Soviets were a de facto government of Russia, and that was all that was necessary in order to give effect to Soviet decrees acting upon property in Russia. The author confuses the relation in this respect, so that the chapter is somewhat jaundiced.

It has always been the reviewer's opinion that recognition of a government de facto had reference to constitutional law. The author believes that the characterization is one made by international law. De facto is a term of opprobrium not used in the sense of "provisional," but designed to indicate that the government achieved success by force and not by other means.

Americans have dealt considerably with the subjects touched upon by the learned author. His publication of opinions of the Law Officers of the Crown following chapters VI, XIV, XV, and XVIII, would alone make the book an important contribution, but the study itself evokes admiration and will exert influence upon the much discussed and disputed subject.

I cannot imagine why the author insists, in the chapter on "implied" recognition, on intention as an element of determination, since the making of a treaty with a country implies recognition in disregard of intention. Intention is irrelevant, because the term "implied" means recognition inferred from conduct. John Bassett Moore thought the Soviets were impliedly recognized by the United States because both countries became signatories of the vague Kellogg Pact. This the author fails to discuss, so far as we can find.

The book might have been better off if the last chapter, "The Principle of Non-Recognition," had been omitted. Here, if we understand him at all, the author contradicts much of what he had to say in the first twenty chapters. He speaks of the League as if the Covenant were a still existing law. This symbol of peace-making, which had

[1] See Baty, So-called "De Facto" Recognition, 31 Yale L.J. 469 (1922).

as its main purpose the nailing down of the Treaty of Versailles, is viewed by the author as moral uplift. All the well-known tests of emotional morality seem to find reflection in the last pages. International law is not a moral science, but is designed to produce stability. Non-recognition as a sanction helps to unsettle and is responsible in part for the present status of international relations. It is too bad that a law book is marred by this dedication to moral uplift. The League is dead, and I am inclined to believe that UN is little improvement.

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